CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 28

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

vs.

CAMDEN FIRE INSURANCE ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 19, 1935.

CERTIORARI GRANTED MAY 20, 1935.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	A	1
Caption (omitted in printing)	A	
Record from D. C. U. S., Western Missouri	B	1
Citation and service (omitted in printing)	B	
Bill of complaint	1	1
Special motion to dismiss	5	5
Order sustaining motion to dismiss	5	6
Petition for appeal	6	6
Assignment of errors	6	7
Order allowing appeal	7	8
Election as to printing	7	8
Praecipe for transcript	8	9
Appeal bond (omitted in printing)	9	
Order extending time to file transcript	10	10
Memorandum opinion of the Court, Reeves, J.	10	10
Clerk's certificate to transcript (omitted in printing)	11	
Appearances of counsel (omitted in printing)	13	
Argument and submission (omitted in printing)	14	
Opinion, Gardner, J.	15	12

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—6499-C

	Original	Print
Decree	22	18
Motion to complete record	23	19
Petition for rehearing	26	20
Order denying motion of appellees to remit transcript of record to District Court, etc., and petition of appellees for rehearing	30	23
Motion to stay issuance of mandate	30	23
Order staying issuance of mandate	31	24
Clerk's certificate (omitted in printing)	32	
Order allowing certiorari	33	24

[fol. A] [Caption omitted]

[fol. B] Citation in usual form showing service on James Dale, filed April 12, 1934, omitted in printing.

[fol. 1] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

BILL OF COMPLAINT—Filed Dec. 21, 1933

To the Honorable the Judges of Said Court:

The Camden Fire Insurance Association brings this, its bill of complaint against Pete DiGiovanni and Mary DiGiovanni and thereupon complains and says:

1. The complainant, the Camden Fire Insurance Association, is a corporation duly organized and existing under and by the virtue of the laws of the State of New Jersey, and is a citizen and inhabitant of said State with its principal place of business in the City of Camden in said State.

2. That the respondents, Pete DiGiovanni and Mary DiGiovanni, are citizens and residents of the State of Missouri and reside in Kansas City, County of Jackson, in said State.

3. That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars.

4. That on the 15th day of May, 1933, the complainant issued and delivered to the respondents its certain policy of fire insurance, Number 910254, purporting to insure said respondents against all direct loss and damage by fire to an amount not exceeding Three Thousand ($3,000.00) Dollars, on the two story, brick building, as therein described and limited, situated at 1030 East 5th Street, in Kansas City, County of Jackson, and State of Missouri; a copy of which policy is filed herewith, made a part hereof, and marked "Exhibit A."

On the same date, to-wit, the 15th day of May, 1933, and as a part of the same transaction, the complainant is-

sued and delivered to the respondents its certain policy of fire insurance, Number 910156, purporting to insure said [fol. 2] respondents against all direct loss and damage by fire to an amount not exceeding Fifteen Hundred ($1,500.00) Dollars upon the contents of the premises, as in said policy described and limited, situated at 1030 East 5th Street, in Kansas City, Jackson County, Missouri; a true and correct copy of which policy is herewith filed, made a part hereof, and marked "Exhibit B."

5. That on the 26th day of May, 1933, the said respondents procured a policy in the sum of Two Thousand ($2,000.00) Dollars in the Eureka Security Fire and Marine Insurance Company, upon the building located at 1030 East 5th Street, Kansas City, Jackson County, Missouri, as hereinbefore described.

That upon the 13th day of May, 1933, said respondents procured through another agency, a policy in the Eureka Security Fire and Marine Insurance Company, upon said building, in the sum of Two Thousand Five Hundred ($2,500.00) Dollars, and that upon the 13th day of May, 1933, said respondents procured from the St. Louis Fire and Marine Insurance Company, a policy in the sum of Two Thousand Five Hundred ($2,500.00) Dollars upon said building; that upon the 5th day of April, 1933, the said respondents procured from the Old Colony Insurance Company a policy in the sum of Five Thousand ($5,000.00) Dollars upon said building, all of which said policies were fire insurance policies; that upon the 5th day of April, 1933, said respondents procured from the Old Colony Insurance Company an explosion policy in the sum of Five Thousand ($5,000.00) Dollars upon said building.

That on the 5th day of April, 1933, the said respondents procured from the Eureka Security Fire and Marine Insurance Company a policy in the sum of One Thousand ($1,000.00) Dollars, upon the contents located in said building, and upon the 5th day of April, 1933, procured a policy in the Old Colony Insurance Company in the sum of Three Thousand Two Hundred ($3,200.00) Dollars upon the contents located in said building, both of which said policies were fire insurance policies.

6. That shortly subsequent to the procurement of said policies as hereinbefore outlined, and to-wit, on the 13th

day of June, 1933, at about twelve-twenty A. M., a fire occurred in said building. Complainant states that the policies hereinbefore named were procured from different agencies; that complainant had no knowledge of the issuance of the other policies herein named until after the fire. Complainant alleges that the said building was of a value not to exceed Six Thousand ($6,000.00) Dollars. Complainant states that all of the aforesaid policies were procured by respondents as a part of a general scheme and plan to [fol. 3] defraud this complainant and the other insurance companies named, and that in furtherance of said plan, the said respondents by and through their servants and agents, caused the said property to be set fire to on said date; that the said respondents procured insurance far in excess of the value of the building and its contents from different agencies, as a part of their general plan and scheme to defraud this said complainant and the other insurance companies, and in order that the respondents might set fire to the property and collect an exorbitant price for the building and its contents; that the said respondents represented to certain of the companies hereinbefore named, and to this complainant that they would not procure in excess of Five Thousand ($5,000.00) Dollars insurance on said building and that they would not procure in excess of Three Thousand Two Hundred ($3,200.00) Dollars insurance upon the contents; that the procurement by the respondents of the aforesaid policies and all of them, from different agencies, was done by the said respondents for the purpose of misleading complainant and the other insurance companies named, and as a part of the general scheme and plan of respondents to burn their property and collect a large sum of money; that immediately following this fire, complainant began an investigation of said fire loss, and has ascertained the facts hereinbefore set forth.

7. That the said respondents have filed proof of loss against all of said companies, claiming a total loss, although said loss was not total, and that they have threatened to sue complainant upon the two policies issued by complainant as hereinbefore set forth, to recover the face amount of said policies.

8. That the complainant has denied liability upon said policies of fire insurance, by reason of the matters and

things hereinbefore averred, and has tendered to the respondents the amount of the premiums paid by respondents for said policies, together with legal interest thereon, from the date of the payment of said premiums, and still tenders to said respondents said premiums and interest, which said tender is renewed herein.

9. That it is the intention of the respondents to use the two said policies of fire insurance issued by complainant as a means of consummating the said fraudulent purpose, scheme, and plan of the said respondents, in procuring said policies, and unless restrained by your honorable court, will institute two actions at law against complainant on said policies of fire insurance in an effort to consummate said fraud.

That title to said real property stands in the name of Pete DiGiovanni and Mary DiGiovanni, husband and wife, [fol. 4] as an estate by the entirety; that complainant has no plain, complete and adequate remedy at law, in that in an action at law, complainant would have the burden of establishing that both respondents participated in the matters and things complained of herein.

Wherefore, needing equitable relief, complainant prays:

1. That a writ of subpoena issue directed to the respondents commanding them, at a certain day, to be and appear before your Honorable Court, and then and there to answer all and singular the premises, and to abide such order and decree therein, as to your Honorable Court shall seem meet.

2. That it be decreed that the policies of fire insurance dated the 15th day of May, 1933, and Numbered 910254 and 910156, referred to in the foregoing bill of complaint, are null and void.

3. That the respondents, their agents, servants, attorneys, and representatives, and each of them, be restrained temporarily until hearing, and permanently thereafter, from instituting any suit upon said policies of fire insurance.

4. That the respondents be ordered and directed to deliver up and surrender to the complainant the said policies of fire insurance, dated June 15th, 1933, and numbered 910254 and 910156 upon payment to them by complainant of the premium paid therefor, with interest.

5. That your complainant may have such further and other relief in the premises as may be just and proper and the equities of the case may require.

Hume & Raymond, Attorneys for Complainant.

Duly sworn by Fenton Hume. Jurat omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT

SPECIAL MOTION TO DISMISS—Filed Jan. 10, 1934

Come now the defendants Pete DiGiovanni and Mary DiGiovanni, appearing specially for the purposes of this motion and for no other purpose whatsoever, and not submitting to the jurisdiction hereof, and move the Court to dismiss the Bill of Complaint filed in the above entitled suit for insufficiency of facts to constitute a valid cause of action in equity against these defendants either severally or jointly in the following respects:

First: It appears from plaintiff's bill that this Court has no jurisdiction to hear and determine this cause.

Second: The bill does not state facts sufficient to constitute a cause of action in equity against these defendants either severally or jointly.

Third: It appears by the plaintiff's bill that it is not entitled to the relief prayed for or any relief herein.

Wherefore, these defendants and each of them, without waiving their right to object to the jurisdiction of this Court, and appearing specially for the purposes of the foregoing motion, and for no other purpose whatsoever, move that the Bill of Complaint in the above entitled cause be dismissed for insufficiency of fact to constitute a valid cause of action in equity against these defendants or either of them, and particularly for the reasons and in the respects aforesaid in this motion and each of them.

James Daleo, Attorney for Defendants.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION TO DISMISS—Filed March 30, 1934

Now on this day this cause coming on regularly for hearing upon respondents' motion to dismiss complainant's bill in equity and the parties appearing herein by their respective counsel and the court having seen and heard said motion and being fully advised does sustain said motion to which complainant then and there excepted and still excepts.

It is therefore ordered, adjudged and decreed by the court that the respondents, Pete Di Giovanni and Mary Di Giovanni, go hence without day and that the costs of this action be taxed against the complainant and complainant is given 40 days within which to file bill of exceptions and transcript in the Circuit Court of Appeals.

March 28, 1934.

Albert L. Reeves, Judge.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 30, 1934

Now comes Camden Fire Insurance Association, a corporation, by its attorneys, Fenton Hume and Walter A. Raymond, and respectfully shows to the court that on the 28th day of March, 1934, the court sustained respondents' motion to dismiss your petitioner's complaint and entered a final judgment on said 28th day of March, 1934, against your petitioner, Camden Fire Insurance Association, fully discharging the respondents, Pete Di Giovanni and Mary Di Giovanni, and taxing the costs of such action against your petitioner, to which action of the court your petitioner then and there excepted and still excepts;

Complainant further states that in said proceedings, judgment and order, certain errors were committed to the prejudice of the complainant all of which more fully appear in detail in the assignment of errors which is filed with this petition;

Wherefore, the premises considered, your petitioner prays that an appeal be allowed in its behalf to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of the errors complained of, and that an order be made fixing the amount of security to be given by the complainant conditioned as the law directs, and upon giving such bond as may be required that all further proceedings shall be suspended until the determination of such appeal and assignment of errors by the Circuit Court of Appeals, and that a transcript of the record proceedings and the papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

Fenton Hume, Walter A. Raymond, Hume & Raymond, Attorneys for Complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed March 30, 1934.

Now comes the Camden Fire Insurance Association, a corporation, complainant in the above numbered and entitled cause and in connection with its petition for appeal in this cause assigns the following errors, which complainant avers occurred in the trial and hearing thereof, upon which it relies to reverse the judgment entered as appears of record:

1. The court erred in holding the jurisdictional amount was not involved to give the court jurisdiction of the cause of action stated in the complaint herein;

[fol. 7] 2. The court erred in holding that the amount of insurance specified in each of the policies described in the complaint could not be aggregated on the issue of the amount involved necessary to give the court jurisdiction;

3. The court erred in holding the complaint did not contain allegations sufficient to raise the issue of a fraudulent conspiracy between the respondents to defraud the complainant which would render operative the rule of law that the several sums specified may be aggregated in case of

such fraudulent conspiracy for the purpose of determining whether the jurisdictional amount exists;

4. The court erred in holding the issues involved with reference to the policies mentioned in the complaint were so different and divergent that the same could not be properly joined in the same bill in equity;

5. The court erred in holding he did not have jurisdiction because the rights of action on said policies described in the complaint were several and could not be joined in a single bill in equity;

6. The court erred in holding respondents were not properly joined as parties respondent in the complaint herein;

Wherefore, complainant prays that the judgment of the court be reversed and the cause be remanded for a new trial.

Hume & Raymond, Attorneys for Complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 30, 1934

It is ordered by the court that an appeal be, and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the order and judgment heretofore rendered herein and that the amount of the supersedeas bond be fixed in the sum of Five Hundred Dollars ($500.00).

March 28, 1934.

Albert L. Reeves, United States District Judge.

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed March 30, 1934

To the Clerk of the United States District Court for the Western Division of the Western District of Missouri:

[fol. 8] You are hereby notified that the complainant, Camden Fire Insurance Association, a corporation, hereby

elects to take and file in the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record requisite for the hearing of said cause, which said transcript of record shall be printed under the supervision of the clerk of the United States District Court at Kansas City, Missouri.

Hume & Raymond, Attorneys for Complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed April 12, 1934

To A. L. Arnold, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri:

Please prepare transcript in the above entitled cause for filing in the United States Circuit Court of Appeals for the Eighth Circuit and include in the same the following:

1. Bill in equity.
2. Motion to dismiss bill in equity.
3. Order and judgment of the court dismissing bill in equity.
4. Memorandum opinion of the court filed in connection with the order sustaining the motion to dismiss bill in equity.
5. Petition for appeal filed in said cause.
6. Assignment of errors filed by appellant in said cause.
7. Order of court allowing appeal in said cause.
8. Citation.
9. Supersedeas bond and order of approval of the same.
10. All orders made in the above entitled cause by the court.
11. Præcipe for transcript of record in said cause.
12. Election as to printing.
13. Orders of court extending time for filing transcript.

Hume & Raymond, Attorneys for Complainant.

Received copy of the above and foregoing Præcipe for Transcript this 4th day of April, 1934.

James Daleo, Attorney for Respondent.

[File endorsement omitted.]

[fol. 9] Bond on appeal approved and filed April 13, 1934, omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed May 8, 1934

Upon application of the plaintiff and for good cause shown, it is ordered that the time for filing the transcript of the record in the United States Circuit Court of Appeals for the 8th Circuit be and is hereby extended to on or before August 1st, 1934.

May 7, 1934.

Albert L. Reeves, Judge of the United States District Court, Western Division of the Western District of Missouri.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION OF THE COURT

This is a motion to dismiss complainant's bill. Complainant filed its bill in equity against the two defendants. By said bill the complainant sought to cancel two policies or contracts of fire insurance, one in the sum of $3,000, and the other in the sum of $1,500. The former insured a building owned by the two defendants; the latter insured personal property owned solely by Pete Di Giovanni, one of the defendants.

It is the contention of the defendants that this court is without jurisdiction for the reason that the amount in controversy does not exceed $3,000. Section 41, Title 28, U. S. Code relates to the jurisdiction of Federal Courts. It is there provided, among other things, that the district courts shall have original jurisdiction, "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000."

In the case at bar, the suit to cancel the policy against the two defendants issued upon the building equals but does

not exceed $3,000, and standing alone would be insufficient to confer jurisdiction upon the court. The suit to cancel the policy upon the personal property is against Pete Di Giovanni alone.

The only question, therefore, is whether this sum could, under the circumstances, be added to the prior figure so as to secure an aggregate of more than $3,000. The rule is practically universal that this can only be done where the parties are the same.

In Woodmen of the World vs. O'Neill, et al., 266 U. S. 292, l. c. 295, the Supreme Court announced the true rule when it said,

"It is the settled general rule * * * that in a suit based on diversity of citizenship brought against several defend-
[fols. 11 & 12] ants to enjoin the collection of claims against the plaintiff which are separate and distinct—although depending for their validity upon a common origin—the test of jurisdiction is the amount of each separate claim, and not their aggregate amount."

On the same page, the Court mentioned the exception recognized in McDaniel vs. Traylor, 196 U. S. 415, l. c. 427, but the court was careful to say that this exception was recognized upon the claim of a conspiracy, thereby bringing all of the parties into a common purpose.

The allegations of the bill in this case do not bring it within the exception.

In Georgia Power Co. vs. Hudson, et al., 49 Fed. (2d) 66, l. c. 68, the Court of Appeals for the Fourth Circuit had before it a somewhat similar situation. It was there pointed out that several "claims are entirely separate and distinct from each other; and, as stated, there is no allegation of fraudulent conspiracy, such as was held to justify considering such claims in the aggregate for the purpose of jurisdiction in Woodmen of the World vs. O'Neill, 266 U. S. 292."

The rule is also stated to the same effect in 27 R. C. L. Section 35, page 33.

In the instant case the policy upon the personal property is a separate and distinct contract from that on the buildings. The measure of proof and recovery are made different by statute, and, moreover, assured under the policy on the personal property is different from the assured on the policy on the real estate.

In view of the above, the Federal District Court is without jurisdiction for the reason that the amount in controversy is insufficient, and, accordingly, the bill will be dismissed.

It is so ordered.

Albert L. Reeves, United States District Court.

Kansas City, Missouri, March 28, 1934.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] Appearances of Counsel omitted in printing.

[fol. 14] Minute entry of argument and submission, Dec. 11, 1934, omitted in printing.

[fol. 15] In United States Circuit Court of Appeals, Eighth Circuit, November Term, A. D. 1934

No. 10,062

Camden Fire Insurance Association, a Corporation, Appellant,

vs.

Pete Di Giovanni and Mary Di Giovanni, Appellees

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Walter A. Raymond (Messrs. Hume & Raymond and Mr. Fenton Hume were with him on the brief), for Appellant.

Mr. James Daleo for Appellees.

Before Gardner, Sanborn, and Van Valkenburgh, Circuit Judges

Opinion—February 14, 1935

Gardner, Circuit Judge, delivered the opinion of the court:

This is a suit in equity brought by appellant, Camden Fire Insurance Association, seeking the cancellation of two

fire insurance policies. Appellees, defendants below, are husband and wife. One of the insurance policies involved is for $3,000.00 and covers a two-story brick building owned [fol. 16] by both defendants, while the other policy is for $1500.00 and covers personal property owned solely by the defendant Pete Di Giovanni, and both the policies insure against loss and damage by fire.

After alleging the issuance of these policies, it is alleged in the bill of complaint that at about the same time defendants produced a policy of fire insurance in the Eureka Security Fire and Marine Insurance Company upon this same building for $2500.00, and one from the St. Louis Fire and Marine Insurance Company for $2500.00, and one from the Old Colony Insurance Company for $5,000.00; also that they procured additional insurance upon the contents of the building, one policy from the Eureka Security Fire and Marine Insurance Company for $1,000.00, and one policy from the Old Colony Insurance Company for $3200.00; that shortly after procuring these policies, and on the 13th of June, 1933, a fire occurred in the building; that all of the policies were procured from different agencies; that the plaintiff had no knowledge of the issuance of the other policies until after the fire; that the building was of a value not to exceed $6,000.00. It is then alleged that, "all of the aforesaid policies were procured by respondents as a part of a general scheme and plan to defraud this complainant and the other insurance companies named, and that in furtherance of said plan, the said respondents by and through their servants and agents, caused the said property to be set fire to on said date; that the said respondents procured insurance far in excess of the value of the building and its contents from different agencies, as a part of their general plan and scheme to defraud this said complainant and the other insurance companies, and in order that the respondents might set fire to the property and collect an exorbitant price for the building and its contents; that the said respondents represented to certain of the companies hereinbefore named, and to this complainant that they would not procure in excess of Five Thousand ($5,000.00) Dollars insurance on said building and that they would not procure in excess of Three Thousand Two Hundred ($3,200.00) Dollars insurance upon the contents; that the procurement by the respondents of the aforesaid policies and all of them, from different agencies, was done by

the said respondents for the purpose of misleading complainant and the other insurance companies named, and as a part of the general scheme and plan of respondents to burn their property and collect a large sum of money; that [fol. 17] immediately following this fire, complainant began an investigation of said fire loss, and has ascertained the facts hereinbefore set forth."

It is then alleged that defendants have filed proof of loss against all of said insurance companies, claiming the total loss, although the loss was not total, and they have threatened to sue complainant upon the two policies issued, to recover the face amount of the policies; that complainant has denied liability, after tendering the premiums paid, together with interest thereon; that it is the intention of defendants to use these policies as a means of consummating their fraudulent scheme, and that unless restrained they will institute two actions at law against complainant on these two policies; that title to the real estate stands in the name of Pete Di Giovanni and Mary Di Giovanni, husband and wife, as an estate by the entirety. Complainant prays for a decree declaring the policies void, and restraining the defendants from instituting suits thereon, and for a delivery of the policies to complainant upon the payment of the premiums and interest.

To this complaint, defendants filed a motion to dismiss on the ground that the court had no jurisdiction, that the bill did not state facts sufficient to constitute a cause of action in equity against defendants, either severally or jointly, and that it appeared from the bill that complainant was not entitled to any relief. This motion was sustained, and from the judgment of dismissal entered, the plaintiff prosecutes this appeal.

Appellees insist that the lower court was without jurisdiction, and hence, properly dismissed the bill of complaint, because the matter in controversy does not exceed the value of $3,000.00. Title 28, Sec. 41, U. S. C. A. Neither of the policies sought to be cancelled exceeds the amount of $3,000.00, and the policy covering the contents of the building was issued to defendant Pete Di Giovanni, although both defendants are alleged to have acted jointly and pursuant to their general scheme and plan to defraud plaintiff in securing same. The general rule is that jurisdiction cannot be conferred upon the federal court by joining claims against distinct and separate defendants, no one of

which equals the jurisdictional amount. First State Bank v. Chicago, R. I. & P. R. Co. (CCA8) 63 Fed. (2d) 585, and cases there cited. But it is contended by appellant that the [fol. 18] claims which the defendants threatened to assert against it are so tied together, by reason of the alleged conspiracy and concerted design, as to entitle it to aggregate these claims for the purpose of maintaining this suit in equity in the federal court.

The complaint charges a concerted design and purpose on the part of the defendants to defraud the plaintiff and other insurance companies, by taking out an exorbitant amount of insurance and then deliberately destroying the property for the purpose of creating apparent liability on the part of the plaintiff in the nature of claims for loss by fire, and both these policies were secured through the concerted action of defendants. We think the allegation of fraudulent combination and concerted design and action constituted a conspiracy which tied together the claims and made the aggregate of the claims the matter in dispute. Woodmen of the World v. O'Neill 266 U. S. 292; McDaniel v. Traylor 212 U. S. 428; Packard v. Banton 264 U. S. 140; First State Bank v. Chicago, R. I. & P. R. Co. (CCA8) 63 Fed. (2d) 585; Premier Malt Products Co. v. Ackerman Printing Co. (CCA7) 24 Fed. (2d) 89; Western Real Estate Trustees v. Hughes (CCA8) 172 Fed. 206; United States v. Charpentier (CCA2) 54 Fed. (2d) 361; Rogers v. Virginia-Carolina Chemical Co. (CCA3) 149 Fed. 1; Fernandina Shipbuilding and Dry Dock Co. v. Peters 283 Fed. 621; Mitchell Woodbury Corp. v. Albert Pick Barth Co. (CCA1) 41 Fed (2d) 148.

In Woodmen of the World v. O'Neill, supra, suit was brought in equity against twenty-five individuals, charging them with entering into a conspiracy to have themselves elected delegates to a session of the Sovereign Camp of the Woodmen of the World, where it was decided they had not been legally elected; that pursuant to said agreement they instituted twenty-five different suits in a local court in Texas to recover amounts ranging from $987.00 to $1170.00, as per diem and mileage for attending at the Sovereign Camp. An injunction was asked against the defendants. They moved to dismiss the bill on the ground that the amount involved was not sufficient to give jurisdiction based solely on diversity of citizenship. In denying this contention, the court, speaking through Mr. Justice Sanford, said:

"We find that under the allegations of the present bill the case comes fairly within the reason of the exception recognized in the McDaniel cases. It is not only alleged [fol. 19] that the defendants' claims are without foundation, but that they originated and are being prosecuted in the state court in pursuance of an agreement and conspiracy to embarrass and attempt to ruin the Society. There is no dispute as to the amount of any particular claim; and the validity of all of them depends upon the same issue. A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy."

In the instant case, as the court dismissed the bill on motion, we must accept all the well pleaded allegations of the bill of complaint as true.

In First State Bank v. Chicago, R. I. & P. R. Co., supra, this court, in an opinion by the late Judge Kenyon, said:

"Plaintiff is asking for a determination of the validity of these fourteen claims and relief from the expense and vexation of having to defend a multiplicity of suits. The action is to cancel, not one of the bills of lading, but all of them. The necessary result of the litigation, were plaintiff successful, would be to cancel a claimed indebtedness of $31,400.00. That is the amount in dispute and in controversy between appellant and appellee in this case. We are satisfied the requisite jurisdictional amount exists."

So, in the instant case, plaintiff is seeking to cancel these policies on which, should the defendants successfully maintain actions at law, they will recover $4500.00, and in the circumstances of this case, the allegations of the bill of complaint being admitted, we think that is the amount in dispute and in controversy between the parties.

The right to maintain an equitable suit to rescind and cancel a contract of insurance because of fraud in securing its execution is well settled by a wealth of authority. New York Life Insurance Co. v. Miller (CCA8) 73 Fed. (2d) 350, and cases there cited.

But it is urged that the plaintiff has a plain, adequate, and complete remedy at law, in that the defense of fraud [fol. 20] is available to it in any actions at law that may be brought upon these policies, and there is undoubtedly authority sustaining this contention in the abstract; in fact, we have so held in New York Life Insurance Co. v. Miller, supra. See, also: Enelow v. New York Life Ins. Co. (U. S. Sup. Ct. Opin. No. 47, handed down Jan. 7, 1935—not yet reported). There are, however, additional circumstances in the present case which may distinguish it from the authorities cited. In the first place, in this case there is a charge of conspiracy, and there are at least two of these policies, so that it would require at least two actions at law and materially increase plaintiff's expenditures in litigation, whereas, the matter, if cognizable in equity, can be disposed of in one suit.

But there is still a further answer to this contention. The adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court. Henrietta Mills v. Rutherford County 281 U. S. 121; Smyth v. Ames 169 U. S. 466; Risty v. Chicago, R. I. & P. R. Co. 270 U. S. 378; Munn v. Des Moines Natl. Bank (CCA8) 18 Fed. (2d) 269; Chicago & N. W. Ry. Co. v. Railroad & Warehouse Commission 280 Fed. 387.

Considered as law actions, the claims of the defendants are separate, and the amount in controversy cannot be aggregated, so that the plaintiff can secure no remedy at law in the federal trial court, nor indeed, would an appeal lie from the ultimate decision of the State Supreme Court to the Supreme Court of the United States, because there is no federal question involved, and the parties are private parties.

It must be borne in mind too that there is here no question involving an interference with the officers of a state in attempting to enforce state revenue laws, nor can it be urged that plaintiff should be required to pursue some legislative remedies, and this, we think, distinguishes this case from the doctrine of Matthew v. Rodgers, 284 U. S. 521 and Porter v. Investors Syndicate 286 U. S. 461.

Plaintiff being free to seek its remedy in the federal court, has a right to insist that the remedy at law which will preclude its right to maintain this suit in equity shall

be a remedy in the federal court. It follows that the court was in error in concluding that it did not have jurisdiction, [fol. 21] and the judgment appealed from is therefore reversed, and the cause is remanded for further proceedings consistent herewith.

[fol. 22] In United States Circuit Court of Appeals, Eighth Circuit

No. 10062

Camden Fire Insurance Association, a Corporation, Appellant,

vs.

Pete Di Giovanni and Mary Di Giovanni

Decree—February 18, 1935

Appeal from the District Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, reversed with costs; and that the Camden Fire Insurance Association, a Corporation, have and recover against Pete Di Giovanni and Mary Di Giovanni the sum of —— Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court filed herein February 14, 1935.

February 18, 1935.

[fol. 23] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

MOTION TO COMPLETE RECORD—Filed March 14, 1935

Now come appellees and move the court to remit the transcript of the record to the district court below, authorizing and directing said district court to cause to be incorporated in said transcript of record, by way of supplemental [fol. 24] record or otherwise, Exhibits A and B referred to in appellant's original bill of complaint and by reference incorporated in said bill as a part thereof, said transcript of record with said amendment or supplement to be returned to this court and filed with the clerk thereof within thirty days from the date of this order.

As reasons for said motion, appellees state that certain portions of said exhibits, being the insurance policies issued by appellant company to appellees, have become material and important in the determination of said appeal, particularly those provisions of said exhibits and insurance policies which provide that other insurance may be carried on the property, and that, if other insurance is so carried in case of loss, the appellant insurance company shall be liable only for its proportionate part of the entire loss. The materiality and importance of these provisions are set out more fully in appellees' motion for rehearing and argument in support thereof, filed concurrently herewith in this court. The transcript of record as now filed in this court, prepared under the direction of appellant, fails to include said Exhibits A and B referred to in its bill.

James Daleo, Attorney for Appellees.

[fol. 25] SUGGESTIONS IN SUPPORT OF MOTION TO COMPLETE RECORD

The propriety of and the authority for an order of this court completing the record as prayed for in the motion—even when first suggested on motion for rehearing—are fully sustained by the following rules and authorities:

"If, at the hearing, it shall appear that any material part of the record has not been printed, the court may make

such order (including dismissal of the appeal) as may seem proper."

Rule 23 of this Court.

"If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript."

Federal Equity Rule 76.

See also:

Fairbanks, Morse & Co. et al. v. American Valve & Meter Co. et al., 276 U. S. 305, 48 S. Ct. 317.

Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U. S. 372, 48 S. Ct. 183.

Hobbs v. National Bank of Commerce of Kansas City, 93 Fed. 615 (C. C. A. 2).

Respectfully submitted, James Daleo, Attorney for Appellees.

Harry L. Jacobs,
Of Counsel.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed March 14, 1935

Appellees move the court to grant a rehearing herein because of material matters of law and fact inadvertently overlooked by the court, as shown by its opinion:

[fol. 27] I

Even if the claims on the two policies issued by complainant are tied together, still the amount involved is less than the jurisdictional amount of $3,000.00. The court inadvertently overlooked this fact in ruling that $4,500.00, the amount of the two policies, was the amount involved. The actual amount affirmatively appears from complainant's own bill to be only $2,700.00. This is so because the bill alleges policies of fire insurance on the building in various

companies, including the complainant, total $15,000.00. Complainant's policy was for only $3,000.00. Consequently, complainant was liable for only one-fifth of the loss. Inasmuch as complainant's bill affirmatively discloses the fact to be that the total value of the building was only $6,000.00, the actual amount involved in the controversy, so far as complainant is concerned, is one-fifth of $6,000.00, or $1,200.00. The amount of complainant's policy on the personalty was $1,500.00. Adding the $1,200.00 and the $1,500.00 together, the total amount actually involved, according to complainant's own bill, is $2,700.00.

II

The court inadvertently overlooked the fact, which affirmatively appears from the complainant's bill, that the building was not a total loss. Inasmuch as the building was not a total loss, then the actual amount or extent of the partial loss is all that complainant could possibly be liable for under its policy on the building. The amount of this loss might be a few dollars or a few hundred dollars. Complainant's bill fails to show the amount of the partial loss. It was incumbent on complainant to affirmatively show that the jurisdictional amount of $3,000.00 was involved. Inasmuch as the full amount of the policy on the personalty was only $1,500.00, and inasmuch as there was not a total loss under the policy on the building, it does not affirmatively appear that $3,000.00 was involved.

[fol. 28]

III

The court inadvertently overlooked the rule of law that where the "great object" of a bill in equity is to prevent suits in state courts, the bill does not state a cause of action for equitable relief, if the matters averred in the bill may be set up as a complete defense to the threatened suits at law in the state court, if such threatened suits are cognizable only by the state courts. The reason for this is that, in such event, no injury is threatened by such suits, and, consequently, there is no occasion for equity to interfere.

IV

In ruling that there was equitable jurisdiction because of a multiplicity of suits, the court inadvertently overlooked the fact that in each of the two insurance policies issued by complainant, the appellee, Pete Di Giovanni,

was one of the parties insured. Consequently, if the suit on the realty, in which the husband and wife, Pete Di Giovanni and Mary Di Giovanni, were the insured, were tried first, that judgment would be res judicata in the suit on the policy involving the personalty wherein Pete Di Giovanni would be the sole plaintiff. On the other hand, if the suit by Pete Di Giovanni on the policy involving the personalty were tried first, that would be res judicata against Pete Di Giovanni in the later suit brought by himself and his wife on the policy involving the realty. Inasmuch as the policy on the building was issued jointly to Pete Di Giovanni and his wife and they held same as tenants by the entirety, holding as one, the binding effect of the first judgment in Pete Di Giovanni's case would prevent recovery in the second case, because there could be no recovery by the tenants by the entirety unless both could sustain the right to recover. This is an incident of estates by the entirety and is the risk the wife took in accepting title as an owner by the entirety.

Moreover, in order to even reason that there was danger of a judgment being first rendered in the suit by Pete [fol. 29] Di Giovanni alone on the policy involving the personalty, which might not be res judicata against his wife in the later suit involving the building, this court necessarily had to assume that the suit on the personalty policy would be tried first. There is no allegation to that effect, nor is there any reason for so inferring. The mere possibility of a multiplicity of suits is not enough. It must appear that there will be a multiplicity of suits. It will be time enough to file a bill in equity when it appears that the suit on the personalty policy is about to be tried first. Jurisdiction of a federal court must affirmatively and distinctly appear, and cannot be eked out by surmise, presumption or inference drawn from the pleadings.

In view of our theory that the claims could not be tied together, the matters raised in this motion for rehearing were not presented and argued. We submit that they are serious and that a rehearing should be granted to the end that same may be fully briefed and argued to the court.

Wherefore, appellees pray a rehearing to the end that justice may be done between the parties.

James Daleo, Counsel for Appellees.

Harry L. Jacobs,
Of Counsel.

Certificate of Counsel

James Daleo, counsel for appellees in this suit, states that he has prepared the petition for rehearing and brief in support of same on behalf of appellees, and that the petition for rehearing is not filed for delay, but is filed in good faith and solely because in his opinion it is well founded in law and should be granted.

James Daleo, Counsel for Appellees.

[fol. 30] [File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Motion of Appellees to Remit Transcript of Record to District Court, etc., and Petition of Appellees for Rehearing—March 18, 1935

The motion filed by counsel for appellees to remit the transcript of the record in this cause to the District Court with directions that there be incorporated therein certain policies of insurance, Exhibits "A" and "B" referred to in appellant's original bill of complaint, and the petition for rehearing filed by counsel for appellees, having been considered, it is now here ordered by this Court that the said motion and petition, be, and they are each hereby, denied.

In United States Circuit Court of Appeals

Motion to Stay Issuance of Mandate—Filed March 23, 1935

Now come appellees and move the court to withhold the Mandate in this case for such time as may be fixed by the court in order that appellees may be afforded ample opportunity to prepare the necessary transcript of the record, petition for certiorari and brief in support thereof in the Supreme Court of the United States.

In this connection appellees represent that they intend, in good faith, to proceed to apply to the Supreme Court of the United States for the Issuance of Writ of Certiorari [fol. 31] with all due and reasonable diligence.

Wherefore, appellees pray the order of court.

James Daleo, Counsel for Appellees.

Harry L. Jacobs,
Of Counsel.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—March 23, 1935

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,514. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 28. Pete Di Giovanni and Mary Di Giovanni, Petitioners, vs. Camden Fire Insurance Association. Petition for a writ of certiorari and exhibit thereto. Filed April 19, 1935. File No. 28 O. T., 1935.

FILE COPY

FILED
APR 19 19
CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1934.

No. [redacted] 28

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A
CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

HARRY L. JACOBS,
Kansas City, Missouri,
Attorney for Petitioners.

JAMES DALEO,
W. T. WOODFORD,
Kansas City, Missouri,
Of Counsel.

INDEX

Petition for Writ of Certiorari—

A. Summary of Matter Involved 2

B. Reasons Relied On for the Allowance of the Writ 9

Brief in Support of Petition for Writ of Certiorari—

I. The Opinion of the Court Below 11

II. Jurisdiction 12

III. Statement of the Case 13

IV. Specification of Errors 13

V. Summary of Argument 15

Point A. Petitioners' motion to complete the record should have been sustained 15

Point B. Where the great object of a bill in equity is to enjoin the prosecution of threatened suits at law in the state court on insurance policies, the bill does not state a cause of action in equity if the defense may be asserted in the state court, even though the case would not be removable to the federal court 15

Point C. Although the face amount of respondent's policies was $4,500.00, its bill in equity disclosed that the actual liability thereon was $2,700.00. Consequently, jurisdictional amount was not involved 16

Point D. The amount of the two policies should not have been tied together in order to ascertain the amount involved for jurisdictional purposes 18

Point E. No multiplicity of suits was involved in the two threatened state court suits, because a judgment for defendant in

either would have been res judicata in the remaining suit. This is so because petitioner, Pete Di Giovanni, was necessarily a plaintiff in each suit, and no liability could be made out against the insurance company in either suit unless Pete Di Giovanni could establish liability 18

VI. Argument 19

Point A. (Specification 1) The circuit court of appeals erred in overruling petitioners' motion to complete the record 19

Point B (Specification 2) The circuit court of appeals erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court 19

Point C. (Specification 3) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00 24

Point D. (Specification 4) The circuit court of appeals erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes 27

Point E. (Specification 5) The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits, or because of a threatened

multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other 29

TABLE OF CASES

Barber Asphalt Pav. Co. vs. Standard Asphalt & Rubber Co., 275 U. S. 372, 48 S. Ct. 183 .....17, 25

Cable vs. United States Life Ins. Co., 191 U. S. 288, 24 S. Ct. 74 .....16, 22, 23

Camden Fire Insurance Association, a Corporation, Appellant, vs. Pete Di Giovanni and Mary Di Giovanni, Appellees (opinion not yet reported) .. 11

Cowell vs. City Water Supply Co., 121 F. 53 (C. C. A. 8) 17, 26

Ex parte Phoenix Ins. Co. of London et al., 117 U. S. 367, 6 S. Ct. 772 .....17, 26

Ex parte Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43 .. 12

Fairbanks, Morse & Co. et al. vs. American Valve & Meter Co. et al., 276 U. S. 305, 48 S. Ct. 317 .....17, 25

Fulbright vs. Phoenix Ins. Co., 44 S. W. (2d) 115, 329 Mo. 207 .....18, 31

Graham vs. Rd., 118 U. S. 161, 6 S. Ct. 1009 .....16, 23

Grand Chute vs. Winegar, 15 Wall. (U. S.) 373, 376 24

Hobbs vs. Nat. Bk. of Commerce of Kansas City, 93 F. 615 (C. C. A. 2) 17, 25

Ins. Co. vs. Bailey, 13 Wall. (U. S.) 616 .....22, 29

Maryland Cas. Co. vs. Price, 231 F. 397, l. c. 403 (C. C. A. 4) 16, 26

Massachusetts Pro. Assn. vs. Stephenson, 5 F. Supp. 586 (D. C. Ky.) 16, 23

McDaniel vs. Traylor, 196 U. S. 415, 25 S. Ct. 369 .. 18, 27

Mechanics Ins. Co. of Phila. vs. C. A. Hoover Distilling Co., 173 F. 888 (C. C. A. 8) 17, 26

Menssen vs. Trav. Ins. Co., 5 Fed. Supp. 114 (D. C. N. Y.) 16, 26

Niagara Fire Ins. Co. of N. Y. vs. Adams, 198 F. 822 (C. C. A. 1) 16, 18, 23, 29

Norton vs. Larney, 266 U. S. 511, 45 S. Ct. 145 ..... 17, 27

N. Y. Life Ins. Co. vs. Johnson, 255 F. 958 (C. C. A. 8) 16, 26

Phillips vs. Negley, 117 U. S. 665, 6 S. Ct. 901 ..... 16, 23

Sovereign Camp vs. O'Neill, 266 U. S. 292, 45 S. Ct. 49 ..... 18, 28

Smith vs. McCullough, 270 U. S. 456, 46 S. Ct. 338 ..... 17, 27

Stifel's Union Brewing Co. vs. Saxy, 273 Mo. 159, 201 S. W. 67 ..... 18, 31

Swan Island Club vs. Ansell, 51 F. (2d) 337 (C. C. A. 4) 16, 26

Wisconsin Cent. Ry. Co. vs. Phoenix Ins. Co. et al., 123 F. 989 (C. C. Wisc.) 17, 26

STATUTES

Federal Equity Rule 76 ..... 17, 25

Rule 23, 8th Cir. Ct. of App. 17, 25

U. S. C. A., Title 28, Sec. 347 12

U. S. C. A., Title 28, Sec. 379 ..... 15, 20

U. S. C. A., Title 28, Sec. 384 ..... 15, 20

TEXT BOOKS

Pomeroy's Equity Jurisdiction, 4th Ed., Vol. 5, Sec. 2107, p. 4750, Note 55 ..... 16, 22

Supreme Court of the United States

OCTOBER TERM, 1934.

No. .....

PETE DI GIOVANNI AND MARY DI GIOVANNI, PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Pete Di Giovanni and Mary Di Giovanni respectfully shows to this Honorable Court:

A.

Summary of Matter Involved.

The respondent insurance association issued two fire insurance policies on May 15, 1933, as follows: One for $3,000.00, naming the petitioners, Pete Di Giovanni and Mary Di Giovanni, as the insured, covering a two-story brick building in Kansas City, Missouri, and the other for $1,500.00, concededly issued to Pete Di Giovanni alone, covering the personal property or contents in said building in Kansas City, Missouri.

On April 5, 1933, fire insurance on said building had been procured from the Old Colony Insurance Company in the sum of $5,000.00, and on May 13, 1933, from St. Louis Fire & Marine Insurance Company in the sum of $2,500.00, and on May 13, 1933, from Eureka Security Fire & Marine Insurance Company in the amount of $2,500.00, and on May 26, 1933, in the sum of $2;000.00 in the Eureka Security Fire & Marine Insurance Company. This made a total of $15,000.00 fire insurance on the building.

On April 5, 1933, fire insurance on the contents of the building in the sum of $1,000.00 had been procured from Eureka Security Fire & Marine Insurance Company, and on April 5, 1933, in the sum of $3,200.00 in the Old Colony Insurance Company. This made a total of $5,700.00 fire insurance on the contents of the building.

On June 13, 1933, a fire occurred in said building, damaging the building and the contents.

On December 21, 1933, the respondent, Camden Fire Insurance Association (as complainant), filed its bill of

complaint in the United States District Court against petitioners, Pete Di Giovanni and Mary Di Giovanni (as defendants), alleging that it was a New Jersey corporation; that defendants were citizens and residents of Missouri, and that the matter in controversy, exclusive of interest and costs, exceeded $3,000.00. The bill of complaint then alleged the issuance and delivery of the $3,000.00 policy and the $1,500.00 policy aforementioned, stating, as to each of said policies, "a copy of which policy is filed herewith, made a part hereof, and marked Exhibit "A." ("B"). (Rec. pp. 1, 2.) The bill of complaint further alleged the issuance of the other policies by the other companies above detailed, and it further alleged the occurrence of said fire. Then the bill of complaint alleged that the policies were procured from different agencies and that complainant had no knowledge of the issuance of the policies other than those issued by itself until after the fire.

The bill of complaint proceeds to allege that all of the policies were procured by defendants as a part of a general scheme and plan to defraud the complainant and the other insurance companies; that in furtherance of said plan the defendants caused the property to be set fire; that the defendants procured insurance far in excess of the value of the building and its contents from different agencies, as a part of said general plan and scheme to defraud, and in order that they might set fire to the property and collect an exorbitant price for the building and its contents; that the defendants represented to complainant and certain of the other companies named that they would not procure in excess

of $5,000.00 insurance on the building and $3,200.00 insurance on the contents; that the procurement by defendants of the aforesaid policies from different agencies was done to mislead complainant and the other insurance companies named, and as a part of the general scheme and plan of defendants to burn their property and collect a large sum of money; that immediately following the fire complainant ascertained said facts and denied liability upon the policies and tendered to defendants the amount of premiums paid by defendants for the policies, with legal interest thereon. (Rec. p. 3.)

The bill of complaint further makes the following allegation: "Complainant alleges that the said building was of a value not to exceed six thousand ($6,000.00) dollars." (Rec. p. 2.)

The bill of complaint further alleges that defendants have filed proofs of loss against all of the companies claiming a total loss "although said loss was not total," and that defendants have threatened to sue complainant upon the two policies issued by complainant as therein set forth, to recover the face amount of said policies. (Rec. p. 3.)

Said bill of complaint further alleges that it is the intention of defendants to use the two said policies of fire insurance issued by complainant as a means of consummating the said fraudulent purpose, scheme and plan "and, unless restrained by your Honorable Court, will institute two actions at law against complainant on said policies of fire insurance in an effort to consummate said fraud." (Rec. p. 3.)

The bill of complaint further alleges that the title to the real property stands in the name of defendants, Pete Di Giovanni and Mary Di Giovanni, husband and wife, as an estate by the entirety. It does not state how the title to the personalty stood, but the policy and the opinion of the district court show the personalty was insured in the name of Pete Di Giovanni alone. (Rec. pp. 3, 4.)

On January 10, 1934, petitioners filed a special motion to dismiss respondent's bill of complaint on the grounds that the court had no jurisdiction and that the bill does not state facts sufficient to constitute a cause of action in equity against the defendants, either jointly or severally, and that it appeared by the plaintiff's bill that it was not entitled to the relief prayed for or any relief. (Rec. p. 5.)

On March 20, 1934, the district court sustained the special motion to dismiss. (Rec. p. 5.) The court filed a memorandum opinion setting forth the reasons for sustaining said motion, to-wit, that the matter in controversy did not exceed $3,000.00 for that the policy on the building only amounted to exactly $3,000.00, and that the policy on the personalty only amounted to $1,500.00, and that the personalty policy ran to Pete Di Giovanni alone, whereas the building policy ran to both defendants. The court ruled that the two policies could not be joined because the parties therein were not the same, and that the two policies were separate and distinct contracts, requiring different measures of proof and recovery. (Rec. pp. 10, 11.)

Upon appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the decree of the district court was reversed February 14, 1935. (Rec. p. 14.) The circuit court of appeals handed down an opinion (Rec. pp. 14-19) in which it ruled as follows (Rec. pp. 18-19):

> "So, in the instant case, plaintiff is seeking to cancel these policies on which, should the defendants successfully maintain actions at law, they will recover $4,500.00, and in the circumstances of this case, the allegations of the bill of complaint being admitted, we think that is the amount in dispute and in controversy between the parties. (Rec. p. 18.) * * * In the first place, in this case there is a charge of conspiracy, and there are at least two of these policies, so that it would require at least two actions at law and materially increase plaintiff's expenditures in litigation, whereas, the matter, if cognizable in equity, can be disposed of in one suit. But there is still a further answer to this contention. The adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court. Considered as law actions the claims of the defendants are separate, and the amount in controversy cannot be aggregated, so that the plaintiff can secure no remedy at law in the federal trial court, nor, indeed, would an appeal lie from the ultimate decision of the State Supreme Court to the Supreme Court of the United States, because there is no federal question involved, and the parties are private parties. Plaintiff being free to seek its remedy in the federal court, has a right to insist that the rem-

edy at law which will preclude its right to maintain this suit in equity shall be a remedy in the federal court.

"It follows that the court was in error in concluding that it did not have jurisdiction, and the judgment appealed from is, therefore, reversed and the cause is remanded for further proceedings consistent herewith." (Rec. pp. 18, 19.)

On March 14, 1935, the petitioners filed in the circuit court of appeals a petition for rehearing, and, also, their motion to complete the record, and their suggestions in support thereof. (Rec. pp. 21, 28.) The said motion was denied and the said petition for rehearing was overruled on March 18, 1935. (Rec. p. 29.)

In the motion to complete the record petitioners moved the court to remit the transcript of the record to the district court below, authorizing and directing said district court to cause to be incorporated therein by way of supplemental record or otherwise, the two insurance policies issued by the respondent and referred to in its original bill of complaint and by reference incorporated in said bill as a part thereof. As reasons for the motion, petitioners stated in the motion that said policies or exhibits had become material and important in the determination of the appeal, particularly those provisions which provided that other insurance might be carried on the property, *and that the appellant insurance company should be liable only for its propor-*

tionate part of the entire loss, and that the transcript of record as then filed in said circuit court of appeals failed to include said Exhibits A and B (the insurance policies) referred to in its bill.

The petition for rehearing raised the points stated in the next paragraph as the precise points involved here.

The precise points involved in this petition for certiorari are these:

1. If the real subject matter of a bill in equity is a threatened suit or suits at law *in a state court* which are not removable to a federal court, and the facts stated in the bill in equity would constitute a complete defense at law in said suit or suits in the state court, is an equity suit maintainable in the federal court on the ground that there is no adequate remedy at law in the federal court?

2. Where the face amount of the policies exceeds $3,000.00 but the bill of complaint on its face shows that the actual loss and liability is less than $3,000.00, is the jurisdictional amount of a federal court involved?

3. Is there a multiplicity of suits involved where the judgment in either of the two threatened suits would be *res judicata* and preclude recovery in the other suit, neither of said threatened suits having been filed at the time the bill in equity was filed?

4. Can an insurance company by charging a conspiracy to defraud, tie together two claims arising under two separate contracts of insurance, one covering real property and the other personal property, aggregating the amounts of the two claims so as to make the required amount for federal jurisdiction?

B.

Reasons Relied On for the Allowance of the Writ.

The circuit court of appeals as will appear from the argument, *post*, has decided, in a way probably untenable:

(a) Important questions of federal law which should be settled by this court.

(b) Important federal question in a way in conflict with decision of another circuit court of appeals on the same matter.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case, numbered and entitled on its docket No. 10062, in Equity, *Camden Fire Insurance Association, a Corporation, Appellant, vs. Pete Di Giovanni and Mary Di Giovanni, Appellees*, and that the

said judgment of the Eighth Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Pete Di Giovanni and
Mary Di Giovanni,
Petitioners.

By HARRY L. JACOBS,
Kansas City, Mo.,
Counsel for Petitioners.

JAMES DALEO,
W. T. WOODFORK,
Kansas City, Mo.,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1934.

No. .....

PETE DI GIOVANNI AND MARY DI GIOVANNI, PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Eighth Circuit Court of Appeals is reported as *Camden Fire Insurance Association, a Corporation, Appellant,* v. *Pete Di Giovanni and Mary Di Giovanni, Appellees,* (opinion not yet reported). (Rec. pp. 14, 19.)

II.

Jurisdiction.

1.

The writ of certiorari is applied for under Rule 35 of this court and Title 28, Section 347, U. S. C. A., and is the proper remedy.

Ex parte Lau Ow Bew, 141 U. S. 583, 12 S. Ct. 43.

2.

The date of the judgment in the trial court is March 28, 1934. (Rec. p. 5.) An appeal was duly perfected and the opinion of the circuit court of appeals rendered February 14, 1935 (Rec. p. 14), and judgment of that court entered thereon on February 18, 1935. (Rec. p. 19.) Petition for rehearing was filed March 14, 1935 (Rec. p. 29), and denied March 18, 1935. (Rec. p. 29.)

3.

Petitioners claimed on appeal that:

1. Respondent has a plain, adequate and complete remedy at law, to the threatened suits on the policies, in that it may assert its defenses in the state court suits.

2. In a case where there are two insurance policies covering different properties, each being of an insufficient amount requisite for federal jurisdiction, and wherein different parties are insured and where the measure of proof and recovery under the two contracts is different, the sums of the two contracts of insurance, to-wit: $1,500.00 and $3,000.00 could not be aggregated so as to make the required amount for federal jurisdiction.

3. Multiplicity of suits is not involved, because judgment for defendant in either suit would be *res judicata* and prevent recovery in the other suit.

The circuit court of appeals held the allegation of fraudulent combination and concerted design and action in respondent's bill of complaint tied together the claims and made the aggregate of the claims the matter in dispute; that there being two policies it would require two actions at law, thereby materially increasing the insurance carrier's expenditures in litigation, whereas, the matter, if cognizable in equity, could be disposed of in one suit; that the adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court, and considered as law actions, the claims of petitioners cannot be aggregated for removal purposes and for that reason respondent can secure no remedy at law in the federal trial court.

III.

Statement of the Case.

Under the heading (A) in the petition, *supra*, is a full statement of the case so far as material to the consideration of the questions presented and, in the interest of brevity, the statement is not repeated at this point.

IV.

Specification of Errors.

(1)

The Circuit Court of Appeals for the Eighth Circuit erred in overruling petitioners' motion to complete the record.

(2)

The Circuit Court of Appeals for the Eighth Circuit erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

(3)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(4)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

(5)

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits, or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

V.

Summary of Argument.

POINT A.

Petitioners' motion to complete the record should have been sustained.

See argument under Point C.

POINT B.

Where the great object of a bill in equity is to enjoin the prosecution of threatened suits at law in the state court on insurance policies, the bill does not state a cause of action in equity if the defense may be asserted in the state court, even though the case would not be removable to the federal court.

(1)

The rule that the complainant must have an adequate remedy at law in the federal court does not apply to actions to restrain suits at law which are only cognizable in state courts. Such is the spirit underlying 28 U. S. C. A., Sec. 379, prohibiting federal courts from enjoining actions pending in state courts, and 28 U. S. C. A., Sec. 384, denying equity jurisdiction when there is an adequate remedy at law.

(2)

Where the subject of equitable relief is a suit at law in a state court, not removable to the federal court, then no possible injury can flow therefrom if a complete defense can be asserted in the state court. Hence a bill in equity to restrain same does not state

a cause of action calling for equitable interposition, since no real danger or injury is disclosed.

Cable v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74.

Pomeroy's Equity Jurisdiction, 4th Ed., Vol. 5, Sec. 2107, p. 4750, Note 55.

Graham v. *Rd.*, 118 U. S. 161, 6 S. Ct. 1009.

Phillips v. *Negley*, 117 U. S. 665, 6 S. Ct. 901.

Niagara Fire Ins. Co. of N. Y. v. *Adams*, 198 F. 822 (C. C. A. 1).

But see *Massachusetts Protective Assn.* v. *Stephenson*, 5 F. Supp. 586 (D. C. Ky.).

POINT C.

Although the face amount of respondent's policies was $4,500.00, its bill in equity disclosed that the actual liability thereon was $2,700.00. Consequently, jurisdictional amount was not involved.

(1)

Respondent and other insurance companies carried a total of $15,000.00 fire insurance on the building. Complainant alleged that the building was of a value not to exceed $6,000.00. Respondent's policy was for $3,000.00. It was, therefore, liable for one-fifth of the total loss, or $1,200.00. Adding the $1,500.00 personalty policy, the actual amount involved was only $2,700.00.

New York Life Ins. Co. v. *Johnson*, 255 F. 958 (C. C. A. 8).

Swan Island Club v. *Ansell*, 51 F. (2d) 337 (C. C. A. 4).

Maryland Cas. Co. v. *Price*, 231 F. 397, l. c. 403 (C. C. A. 4).

Menssen v. *Trav. Ins. Co.*, 5 Fed. Supp. 114 (D. C. N. Y.).

Cowell v. *City Water Supply Co.*, 121 F. 53 (C. C. A. 8).

Ex Parte Phoenix Ins. Co. of London et al., 117 U. S. 367, 6 S. Ct. 772.

Mechanics Ins. Co. of Phila. v. *C. A. Hoover Distilling Co.*, 173 F. 888 (C. C. A. 8).

Wisconsin Central Ry. Co. v. *Phoenix Ins. Co. et al.*, 123 F. 989 (C. C. Wisc.).

Norton v. *Larney*, 266 U. S. 511, 45 S. Ct. 145.

Smith v. *McCullough*, 270 U. S. 456, 46 S. Ct. 338.

(2)

The insurance policies referred to in respondent's bill of complaint were not included in the record. Petitioners' motion in the circuit court of appeals to complete the record by showing said policies should have been sustained because said policies each contain a provision that the respondent should only be liable for its proportion of the loss, where there was other insurance.

Federal Equity Rule 76.

Fairbanks, Morse & Co. et al. v. *American Valve & Meter Co. et al.*, 276 U. S. 305, 48 S. Ct. 317.

Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 48 S. Ct. 183.

Hobbs v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2).

Rule 23 of 8th Circuit Court of Appeals.

POINT D.

The amount of the two policies should not have been tied together in order to ascertain the amount involved for jurisdictional purposes.

McDaniel v. *Traylor*, 196 U. S. 415, 25 S. Ct. 369, involved a conspiracy to fix John Evans' debts on the estate of Hiram Evans, deceased. Consequently, the entire amount of John Evans' debts was the amount involved, although the debts were held by various claimants.

In *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, 45 S. Ct. 49, the object of the conspiracy was to ruin the defendant by numerous meritless suits. The object was not to collect the various separate amounts sued for in the meritless suits. The singleness of the main object tied into one the incidental claims, which were really devices or overt acts to accomplish the main single object.

POINT E.

No multiplicity of suits was involved in the two threatened state court suits, because a judgment for defendant in either would have been res judicata in the remaining suit. This is so because petitioner, Pete Di Giovanni, was necessarily a plaintiff in each suit, and no liability could be made out against the insurance company in either suit unless Pete Di Giovanni could establish liability.

Niagara Fire Ins. Co. et al. v. *Adams et al.*, 198 F. 822, l. c. 823 (C. C. A. 1).

Stifel's Union Brewing Co. v. *Saxy*, 273 Mo. 159, 201 S. W. 67.

Fulbright v. *Phoenix Ins. Co.*, 44 S. W. (2d) 115 329 Mo. 207.

VI.

Argument.

POINT A.

(Specification 1.)

The circuit court of appeals erred in overruling petitioners' motion to complete the record.

The argument under this point logically falls in with the argument under Point C and will be found there.

POINT B.

(Specification 2.)

The circuit court of appeals erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

The complainant's bill alleges that two suits were threatened, namely, one on the $3,000.00 policy on the building, and the other on the $1,500.00 policy on the personalty. Neither of these suits would be removable to the federal court. Although the alleged fraud set up in the complainant's bill of complaint would constitute a complete defense in the state court, yet the circuit court of appeals held that fact immaterial for the reason that complainant had no adequate remedy at law or defense *assertable in the federal court.*

This presents a very interesting question upon which we frankly concede we have been unable to find any decision squarely in point. The importance of this is

apparent because, if the opinion of the circuit court of appeals correctly declares the law, in every future case where there is more than one policy issued by the same company (or there is one policy for more than $3,000.00, but threatened suit is for a smaller installment then due) and the defense is fraud in the procurement of the policies, the insurer will defeat the insured's right to a trial by jury by resort to bill in equity in the federal court for cancellation and injunction.

We believe that the rule that the complainant must have an adequate remedy at law *in the federal court* has no application to cases where the active subject matter of the bill (really a bill of peace or *quia timet*) and the "great object" (91 U. S. 254, 257) thereof are to restrain prosecution of threatened suits at law, themselves cognizable only by state courts. Certainly to so apply the rule would run counter to the spirit and public policy which underlie 28 U. S. C. A., Sec. 379, which prohibits federal courts from enjoining proceedings already pending in state courts, and 28 U. S. C. A., Sec. 384, which denies equity jurisdiction to federal courts when there is an adequate remedy at law, and to the Seventh Amendment to the Constitution which preserves in federal courts the right to trial by jury in cases involving more than $20.00.

If one sues in equity to enjoin prosecution of threatened suits at law in a state court, surely, to state a cause of action in equity, he must demonstrate in his bill that there is a real cause for apprehension of injury on his part. In considering whether or not the alleged danger is actual or whether it is only illusory, the

decisive test must be whether the defense is assertable *in the very forum where the danger is alleged to exist.* If such a threatened suit or suits could not be removed to the federal court, then clearly the only question is whether the defense is assertable in the state court.

If a wild animal is confined to a certain cage, no one has the right to complain that this animal is dangerous, merely by asserting that he cannot defend himself against it or slay it at some other place where it can never be. If the monster that the complainant seeks to decapitate by its bill can only rear its head in the state court, then in ascertaining whether or not it really is a monster or whether it is merely a myth (so far as danger is concerned) no question is involved of whether or not the sword that can render it harmless can be thrust in the federal court, where this monster can never appear. The question is whether a confined apparition can be dispelled in the only place where it is claimed it will appear or ever can appear, not whether it can be destroyed in a place where no one even claims it can ever possibly appear to frighten or injure the complainant. If one files a bill to abate a nuisance in Washington, D. C., in determining whether or not he has stated a cause of action, the only question is whether the alleged nuisance really constitutes a nuisance in the place that it actually is and will remain, not whether it would be a nuisance if in some other place where it never can be.

Where the subject of a bill for equitable relief is peculiarly a suit or suits at law which can only be filed in a state court, then no possible injury can flow therefrom if a complete defense can be asserted in that state court, and

it does not state a cause of action for equitable interference. *Strictly speaking, the point involved is not so much whether there is an adequate remedy at law or not. It is safer to plant the proposition on the ground that no cause of action is stated in equity because no real danger or injury inviting equitable interposition is disclosed under the pleaded circumstances.* The alleged poison is disclosed to carry along with it a complete antidote neutralizing it wherever the poison may appear.

This court has ruled that where the threatened suits at law would be removable to the federal courts, then no bill in equity will lie.

> *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 24 S. Ct. 74.
>
> See, also, *Insurance Co.* v. *Bailey*, 13 Wall. (U. S.) 616.

The writer of the notes to the Fourth Edition of Pomeroy's Equity Jurisdiction, Vol. 5, Sec. 2107, p. 4750, Note 55, has this to say about it:

> "Some federal courts have found support for assuming jurisdiction on the extraordinary ground that the action to which complainant would be called upon to make defense might be an action in a state court. *Mutual Life Ins. Co.* v. *Pearson*, 114 Fed. 395, 397; *United States L. Ins. Co.* v. *Cable*, 98 Fed. 761, 763, 39 L. R. A. 264; *Mutual Life Ins. Co.* v. *Blair*, 130 Fed. 971. These cases have been practically overruled, however, in the late case of *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74."

No doubt the reference in the above quotation was to the following language of this court in the opinion in the *Cable Case* (l. c. 78):

"Where a plaintiff in a state court which has jurisdiction over the subject matter brings the defendant properly within such jurisdiction, he is entitled to a trial of his cause in that court, unless the case be removed to a federal court upon some constitutional ground. If that ground exists, the removal can be made, but if it does not, equitable jurisdiction does not accrue to a federal court because it is thought the law as administered by that court more favorable to the party seeking its aid."

Cable v. *U. S. Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74.

In cases dealing with bills in equity to restrain enforcement of judgments rendered by state courts, this court has ruled that no case in equity is stated if there is an adequate remedy at law *in the state court* by appeal from the judgment complained of. We see no distinction in legal principle where the defense may be presented at the original trial.

Graham v. *Rd.*, 118 U. S. 161, 6 S. Ct. 1009.

Phillips v. *Negley*, 117 U. S. 665, 6 S. Ct. 901.

See, also, *Niagara Fire Ins. Co. of N. Y.* v. *Adams*, 198 F. 822 (C. C. A. 1).

We call the attention of the court to the following case which squarely rules against our contention. However, we think it is based on a misconception of the implications to be drawn from the decisions of this court in the Cable and Bailey cases.

Massachusetts Protective Assn. v. *Stephenson*, 5 F. Supp. 586 (D. C. Ky.).

POINT C.

(Specification 3.)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(Point A, involving the motion to complete the record by showing the policies sued on, is argued under this heading, also.)

The bill alleges the following policies of fire insurance on the building:

$3000.00	Camden Fire Ins. Association	5-15-33
2000.00	Eureka Security, etc.	5-26-33
2500.00	Eureka Security, etc.	5-13-33
2500.00	St. Louis Fire & Marine Ins. Co.	5-13-33
5000.00	Old Colony	4- 5-33
$15,000.00		

Complainant's insurance policy of $3,000.00 on the building was one-fifth of the total fire insurance on the building. Complainant alleged in the bill that the building was of a value not to exceed $6,000.00. On motion to dismiss, this allegation must be taken as true.

Grand Chute v. *Winegar*, 15 Wall. (U. S.) 373, 376.

One-fifth of the total loss of $6,000.00 is $1,200.00. Adding to this $1,200.00, the full amount of the policy on the personal property, to-wit, $1,500.00, the total loss of

respondent under its own bill in equity cannot possibly exceed $2,700.00. Therefore, the jurisdictional amount is not involved.

In order to show that respondent's policies referred to in its bill in equity each contained a provision that the insurer was only to be liable for such proportion of any loss as the amount of the policy bore to the whole amount of fire insurance applying, whether such other insurance contained a similar clause or not, petitioners filed their motion in the United States Circuit Court of Appeals for completion of the record, filing the original policies with the clerk of said court. If the point we are making is meritorious, then the circuit court of appeals should have sustained said motion.

Federal Equity Rule 76.

Fairbanks, Morse & Co. et al. v. *American Valve & Meter Co. et al.*, 276 U. S. 305, 48 S. Ct. 317.

Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 48 S. Ct. 183.

Hobbs v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2).

Rule 23 of 8th Circuit Court of Appeals.

We have requested the clerk of the circuit court of appeals to transmit said original policies to the clerk of this court. We quote from said policies as follows:

> "3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance applying whether such other insurance contains a similar clause or not."
>
> Policy No. 910156.

"3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance applying whether such other insurance contains a similar clause or not."

Policy No. 910254.

It is not the amount claimed in a prayer for relief, or which complainant says in its pleading is involved, that determines the jurisdiction of the federal court if the "unmistakable fact and legal certainty be" that a lesser amount is involved. The amount of loss is the amount involved, after fire.

New York Life Ins. Co. v. *Johnson*, 255 F. 958 (C. C. A. 8).

Swan Island Club v. *Ansell*, 51 F. (2d) 337 (C. C. A. 4).

Maryland Cas. Co. v. *Price*, 231 F. 397, l. c. 403 (C. C. A. 4).

Menssen v. *Trav. Ins. Co.*, 5 Fed. Sup. 114 (D. C. N. Y.).

Cowell v. *City Water Supply Co.*, 121 F. 53 (C. C. A. 8).

The amount of liability on the policies issued by the other companies mentioned in the bill does not increase the amount involved so far as complainant is concerned.

Ex parte Phoenix Ins. Co. of London et al., 117 U. S. 367, 6 S. Ct. 772.

Mechanics Ins. Co. of Phila. v. *C. A. Hoover Distilling Co.*, 173 F. 888 (C. C. A. 8).

Wisconsin Central Ry. Co. v. *Phoenix Ins. Co. et al.*, 123 F. 989 (C. C. Wisc.).

Furthermore, the bill of complaint affirmatively alleged that the building was not a total loss. Since there is no allegation of the amount of the loss to the building, it is impossible to ascertain how much damage there was thereto. It might only have been nominal damage. Consequently, the jurisdiction of the court has not been made to affirmatively and distinctly appear.

Norton v. *Larney*, 266 U. S. 511, 45 S. Ct. 145.

Smith v. *McCullough*, 270 U. S. 456, 46 S. Ct. 338.

POINT D.

(Specification 4.)

The Circuit Court of Appeals erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

Concededly, the general rule is that separate claims cannot be tied together. The circuit court of appeals thought that the instant case fell within the rulings of two exceptional decisions of this court.

The first of the cases was *McDaniel* v. *Traylor*, 196 U. S. 415, 25 S. Ct. 369. This case involved a situation where conspirator creditors in league with the administrator of an estate had fraudulently proved and procured to be allowed in probate court illegal claims. The essence of the conspiracy was to fix on the estate of Hiram Evans, deceased, the debts of John Evans, which

the defendants, except the administrator, held. The single object, to-wit, to fasten John Evans' liabilities on Hiram Evans' estate, schemed at by all of the defendants, was quite properly measured as an entirety, and the amount involved was the total amount of John Evans' debts. This would have been true whether John Evans' debts were all held by one claimant or by many claimants.

In *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, 45 S. Ct. 49, the alleged object of the conspirators was to ruin the defendant by numerous meritless suits, the defense of which entailed enormous expense. The real object was not to collect the various separate amounts sued for in said meritless suits. The main and controlling objective of these numerous suits being simply to ruin the defendant corporation, and that being the common object of the conspiracy (the suits being merely the device or overt acts resorted to in order to accomplish the main object), this court ruled that the singleness of the main object tied the incidental claims together into one.

These two cases properly analyzed bear no analogy to the case at bar. In the case at bar there is no single objective which ties these claims together. Here are involved just two insurance policies and two proposed suits at law, each to collect on one of the policies, with no further underlying objective. There is nothing exceptional in the circumstances of this case to tie the claims together, except that they had a common origin. It could just as well be urged that whenever a man, even

in the best of faith, takes out two fire policies on the same property, that his object is to collect just a single sum in the event of a fire, and that, consequently, the amount involved is that single sum. The case at bar falls within the rule often applied that common origin does not tie the claims together. It does not fall within the exception that where there is a single, controlling, ulterior objective, participated in by all of the parties involved, that then the claims will be tied together.

See also, *Phoenix Mut. Life Ins. Co.* v. *Bailey*, 13 Wall. (U. S.) 616.

POINT E.

(Specification 5.)

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits, or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

Because there were two policies and a threatened suit on each, the circuit court of appeals concluded that there was a multiplicity of suits involved. This ruling conflicts with the following ruling of the United States Circuit Court of Appeals for the First Circuit.

Niagara Fire Ins. Co. et al. v. *Adams et al.*, 198 F. 822, l. c. 823 (C. C. A. 1).

It will be observed that Pete di Giovanni must be one of the plaintiffs in each suit. If the suit on the building, in which both Pete di Giovanni and his wife are plain-

tiffs, were tried first, then the judgment in that suit would be *res judicata* against Pete di Giovanni, so that there would be no danger to apprehend from the second suit, and there would be no multiplicity of suits or no further suit to try, as a matter of fact.

There is no presumption, that the case on the personal property will be tried before the case involving the building policy, yet, on the court's own theory, the court must assume and infer in order to justify a bill in equity, that the case brought by the husband alone on the personalty policy will be tried first. There is no such allegation in the bill. Why should such a thing be surmised? Under the facts of this pleading both suits would be filed at the same time and tried at the same time. Certainly until it actually appears and is alleged that the suit of the husband alone is going to be tried first, there is no reason to surmise that that will be done. It will be time enough to file a bill in equity to prevent a multiplicity of suits when it actually appears that there will be a multiplicity of suits, not merely that there is a possibility of same.

But let us suppose that Pete di Giovanni's suit on the policy covering the personalty is tried first and he is defeated. If he is there defeated, the suit on the policy covering the building cannot be maintained. For that suit must be maintained by *husband and wife*, as tenants by the entirety. Neither can recover singly. But as plaintiff Pete di Giovanni is barred from recovering, the liability as to him being *res judicata*, there can be no

joint recovery. It is the risk the wife took in accepting title as a tenant by the entirety.

Stifel's Union Brewing Co. v. *Saxy*, 273 Mo. 159, 201 S. W. 67.

Fulbright v. *Phoenix Ins. Co.*, 44 S. W. (2d) 115. 329 Mo. 207.

Respectfully submitted,

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CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 28.

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

PETITIONERS' STATEMENT, SPECIFICATION OF ERRORS AND ARGUMENT.

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SUBJECT INDEX

Opinions Below, Official Reports 1

Jurisdiction, Certiorari Granted 2

Statement of Case—

(1) Policies issued 2,3

(2) Bill for cancellation filed 3

(3) Fraud alleged 4

(4) Lack of adequate remedy alleged 5

(5) Motion to dismiss filed 6

(6) Motion to dismiss sustained 6

(7) Reversed by circuit court of appeals 6

(8) Motion for rehearing 7

(9) Motion to complete record 7

(10) Precise points involved—

(a) Remedy at law in state courts 8

(b) No multiplicity of suits 9

(c) Improper to tie claims together 9

(d) Jurisdictional amount not involved 9

Specification of Errors—

1. Overruling motion to complete record 9

2. Ruling federal court remedy necessary 9

3. Ruling jurisdictional amount involved 10

4. Tying claims together 10

5. Ruling multiplicity of suits involved 10

Summary of Argument 10

Argument—

Point A. Motion to complete record 18

Point B. No cause of action in equity stated 18

(a) Adequate remedy in state court, nonremovable cases 18

(b) No reasonable grounds to fear injury 19

(c) Federal remedy rule inapplicable to qui timet bills 22

(d) Federal equity jurisdiction prohibited in nonremovable cases 23

(e) Exceptions to federal remedy rule 24

(f) Federal remedy cases inapplicable .. 24

Point C. No multiplicity of suits or vexatious litigation 25

(a) (1) No vexatious litigation intended 25

(2) Complainant's right not established 25

(b) and (c) One decision ends litigation 26

Point D. Jurisdictional amount not involved 27

(a) (1) Policies limit liability to $2700 28

(2) Motion lies to complete record 29

(b) Amount claimed on policies not decisive 30

Point E. Claims not united by conspiracy allegations 31

(a) Cases distinguished 31

(b) Complainant's separate policies estop joinder 33

Appendix—

(a) Babcock vs. Rieger, (K. C. App.) quoted 35
(b) First Judiciary Act, Sept. 24, 1789, quoted .. 39
(c) Fed. Eq. Rule 76 42
(d) Rule 23, Par. 4, Eighth Circuit 42
(e) Rule 13, Par. 9, Supreme Court 43

TABLE OF CASES

Babcock vs. Rieger, 58 S. W. (2d) 722, 332 Mo. 538 ..... 12, 14, 21, 25, 34
Babcock vs. Rieger, Case No. 16651 (K. C. App.) 12, 21, 25
Barber Asphalt Paving Co. vs. Standard Asphalt & Rubber Co., 276 U. S. 372 ..... 15, 29
Boise Artesian H. & C. Water Co. vs. Boise City, 213 U. S. 276 ..... 13, 14-15, 24, 27
Butler vs. Durham, 2 Ga. 413 ..... 12, 14, 21, 25
Cable vs. Ins. Co., 191 U. S. 288 ..... 12, 21, 22, 23, 26
Camden Fire Ins. Association vs. Di Giovanni, 75 F. (2d) 808 2
Continental Cas. Co. vs. Yerxa, 16 F. (2d) 473 22
Di Giovanni vs. Camden Fire Ins. Ass'n, ... U. S. ...., 55 S. Ct. 834 2
Enelow vs. N. Y. Life Ins. Co., 293 U. S. 379 ..... 12, 22
Ex parte Lau Ow Bew, 141 U. S. 583 2
Ex parte Phoenix Ins. Co., 117 U. S. 367 ..... 15, 30
Fairbanks, Morse & Co. et al. vs. American Valve & Meter Co. et al., 276 U. S. 305 ..... 15, 29
Fulbright vs. Phoenix Ins. Co., 329 Mo. 207, 44 S. W. (2d) 115 ..... 14, 27
Graham vs. Rd., 118 U. S. 161 ..... 13, 24
Grand Chute vs. Winegar, 15 Wall. 373 .... 12, 15, 22, 28
Hipp vs. Babin, 19 Howard 271, 279 ..... 15, 27

Hobbs vs. Nat. Bank of Commerce of Kansas City, 93 F. 615 (C. C. A. 2) 15, 29
Holland vs. Challen, 110 U. S. 15 ..... 12, 14, 21, 25
Insurance Co. vs. Bailey, 13 Wall. 616 ..... 12, 15, 22, 27
In re Reisenberg, 208 U. S. 90 ..... 16, 31
Mass. Prot. Ass'n vs. Stephenson, 5 F. (Supp.) 586 (D. C. Ky.) 12, 22
Matthew vs. Rogers, 284 U. S. 521 ..... 13, 24
McDaniel vs. Traylor, 196 U. S. 415 ..... 16, 31
Mechanics Ins. Co. vs. Dist. Co., 173 F. 888 (C. C. A. 8) 15-16, 30
Niagara Fire Ins. Co. vs. Adams, 198 F. 822 (C. C. A. 1) 12, 15, 22, 27
Norton vs. Larney, 266 U. S. 511 ..... 16, 30
N. Y. Life Ins. Co. vs. Marshall, 21 F. (2d) 172, affd. 23 F. (2d) 225 (C. C. A. 5) 15, 27
N. Y. Life Ins. Co. vs. Johnson, 255 F. 958 (C. C. A. 8) 15, 30
Pac. Mut. Life Ins. Co. vs. Parker, 71 F. (2d) 872, 876 (C. C. A. 4) 14, 15, 25, 27
Phillips vs. Negley, 117 U. S. 665 ..... 13, 24
Pioneer Pyr. Life Ins. Co. vs. Hughey, 76 F. (2d) 524 (C. C. A. 4) 12, 15, 22, 27
Porter vs. Investors Syndicate, 286 U. S. 461 ..... 13, 24
Prentis vs. Atl. Coast Line Co., 211 U. S. 210 ..... 13, 24
Russell vs. Clark's Exec., 7 Cranch. 69, l. c. 89 ..... 12, 21
Schacker vs. Ins. Co., 93 U. S. 241 ..... 15, 30
Schunk vs. Moline, Milburn & Stoddard Co., 147 U. S. 500 ..... 16, 31
Scottish U. & N. Ins. Co. vs. Bowland, 196 U. S. 611 ..... 12, 22
Smith vs. McCullough, 270 U. S. 456 ..... 16, 30
Smyth vs. Ames, 169 U. S. 466 ..... 13, 24
Sovereign Camp vs. O'Neill, 266 U. S. 292 ..... 16, 32

Stifel's Union Brewing Co. vs. Saxy, 273 Mo. 159, 201 S. W. 67 ..... 14, 27

Wisconsin Central Ry. Co. vs. Ins. Co., 123 F. 989 (C. C. Wisc.) 16, 30

Wright vs. Ins. Co., 19 F. (2d) 117 (C. C. A. 5), 276 U. S. 602 19

STATUTES

Federal Equity Rule 76 ..... 15, 29, 42

Rule 13, Par. 9 of Supreme Court 15, 29, 42

Rule 23, 8th Cir. Ct. of App., Par. 1 ..... 15, 29, 42

1 Stat. 79 (See 36 Stat. 1094) 42

1 Stat. 82 ..... 12, 23

1 Stat. 82 (See 36 Stat. 1163) 42

36 Stat. 1162, 28 U. S. C. A., Sec. 379 ..... 11, 19

36 Stat. 1163, 28 U. S. C. A., Sec. 384 19

43 Stat. 938 (Title 28, Sec. 347, U. S. C. A.) 2

TEXT BOOKS

Bispham's Prin. of Eq. (9th Ed.), Secs. 474, 568, pp. 751, 852 ..... 11-12, 21

21 Corpus Juris, Sec. 50, pp. 76, 77, 78 14

Encyc. of Pl. & Pr., Vol. 3, p. 599 ..... 12, 21

Hogg on Eq. Princ., Sec. 45, p. 80 ..... 12, 21

Pomeroy's Eq. Jur. (4th Ed.), Vol. 5, Sec. 2107, p. 4750, Note 55 ..... 12, 22

Story's Eq. Jur. (14th Ed.), Vol. 2, Secs. 935, 936, 948, pp. 313, 316, 330 ..... 11, 21

Tiedeman on Eq. Jur., Secs. 539, 540, pp. 632, 633 ..... 12, 21

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 28.

PETE DI GIOVANNI AND MARY DI GIOVANNI, PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

I.

OPINIONS REPORTED.

The date of the judgment in the trial court is March 28, 1934. (Rec. p. 6.) The opinion of the circuit court of appeals was rendered February 14, 1935 (Rec. p. 12), and judgment entered thereon February 18, 1935. (Rec. p. 18.) Petition for rehearing was filed March 14, 1935 (Rec. p. 20), and denied March 18, 1935. (Rec. p. 23.) The opinion of the district court is unreported but appears at pages 10 to 12 of the record. The opinion of the United States Circuit Court of Appeals for the

Eighth Circuit is reported as *Camden Fire Insurance Association* v. *Di Giovanni*, 75 F. (2d) 808.

II.

JURISDICTION.

Application was made to this court for writ of certiorari under Rule 38 and 43 Stat. 938 (Title 28, Sec. 347, U. S. C. A.) and was the proper remedy.

Ex parte Lau Ow Bew, 141 U. S. 583.

Writ of certiorari was granted May 20, 1935. (Rec. p. 24.)

Di Giovanni v. *Camden Fire Ins. Ass'n*, ... U. S. ...., 55 S. Ct. 834.

III.

STATEMENT OF THE CASE.

The respondent, Camden Fire Insurance Association, issued two fire insurance policies on May 15, 1933, as follows: One for $3,000.00, naming the petitioners, Pete Di Giovanni and Mary Di Giovanni, as the insured, covering a two-story brick building in Kansas City, Missouri, and the other for $1,500.00, concededly issued to Pete Di Giovanni alone, covering the personal property or contents in said building in Kansas City, Missouri. (Rec. pp. 1, 2.)

On April 5, 1933, fire insurance on said building had been procured from the Old Colony Insurance Company in the sum of $5,000.00, and on May 13, 1933, from St. Louis Fire & Marine Insurance Company in the sum of

$2,500.00, and on May 13, 1933, from Eureka Security Fire & Marine Insurance Company in the amount of $2,500.00, and on May 26, 1933, in the sum of $2,000.00 in the Eureka Security Fire & Marine Insurance Company. This made a total of $15,000.00 fire insurance on the building. (Rec. p. 2.)

On April 5, 1933, fire insurance on the contents of the building in the sum of $1,000.00 had been procured from Eureka Security Fire & Marine Insurance Company, and on April 5, 1933, in the sum of $3,200.00 in the Old Colony Insurance Company. (Rec. p. 2.) This made a total of $5,700.00 fire insurance on the contents of the building.

On June 13, 1933, a fire occurred in said building, damaging the building and the contents. (Rec. pp. 2, 3.)

On December 21, 1933, the respondent, Camden Fire Insurance Association (as complainant), filed its bill of complaint (Rec. pp. 1 to 5) in the United States District Court, Western District of Missouri, against petitioners, Pete Di Giovanni and Mary Di Giovanni (as defendants), alleging that it was a New Jersey corporation; that defendants were citizens and residents of Missouri, and that the matter in controversy, exclusive of interest and costs, exceeded $3,000.00. (Rec. p. 1.) The bill of complaint then alleged the issuance and delivery of the $3,000.00 policy and the $1,500.00 policy aforementioned, stating, as to each of said policies, "a copy of which policy is filed herewith, made a part hereof, and marked Exhibit 'A'" ("B"). (Rec. pp. 1, 2.) The bill of complaint further alleged the issuance of the other policies

by the other companies above detailed, and the occurrence of said fire. (Rec. pp. 2, 3.) Then it alleges that the policies were procured from different agencies and that complainant had no knowledge of the issuance of the policies other than those issued by itself until after the fire. (Rec. p. 3.)

The bill of complaint proceeds to allege that all of the policies were procured by defendants as a part of a general scheme and plan to defraud the complainant and the other insurance companies; that in furtherance of said plan the defendants caused the property to be set fire; that the defendants procured insurance far in excess of the value of the building and its contents from different agencies, as a part of said general plan and scheme to defraud, and in order that they might set fire to the property and collect an exorbitant price for the building and its contents; that the defendants represented to complainant and certain of the other companies named that they would not procure in excess of $5,000.00 insurance on the building and $3,200.00 insurance on the contents; that the procurement by defendants of the aforesaid policies from different agencies was done to mislead complainant and the other insurance companies named, and as a part of the general scheme and plan of defendants to burn their property and collect a large sum of money; that immediately following the fire complainant ascertained said facts and denied liability upon the policies and tendered to defendants the amount of premiums paid by defendants for the policies, with legal interest thereon. (Rec. p. 3.)

The bill of complaint further makes the following allegation: "Complainant alleges that the said building was of a value not to exceed six thousand ($6,000.00) dollars." (Rec. p. 3.)

It also alleges that defendants have filed proofs of loss against all of the companies claiming a total loss "although said loss was not total," and that defendants have threatened to sue complainant upon the two policies issued by complainant as therein set forth, to recover the face amount of said policies. (Rec. p. 3.)

The bill then alleges that it is the intention of defendants to use the two said policies of fire insurance issued by complainant as a means of consummating the said fraudulent purpose, scheme and plan "and, unless restrained by Your Honorable Court, will institute two actions at law against complainant on said policies of fire insurance in an effort to consummate said fraud." (Rec. p. 4.)

The bill of complaint further alleges that the title to the real property stands in the name of defendants, Pete Di Giovanni and Mary Di Giovanni, husband and wife, as an estate by the entirety. (Rec. p. 4.) It does not state how the title to the personalty stood, but the policy and the opinion of the district court and the opinion of the circuit court of appeals, show the personalty was insured in the name of Pete Di Giovanni alone. (Rec. pp. 10, 13.)

The bill charges that "complainant has no plain, complete and adequate remedy at law, in that in an action at law, complainant would have the burden of

establishing that both respondents participated in the matters and things complained of herein." (Rec. p. 4.)

On January 10, 1934, petitioners filed a special motion to dismiss respondent's bill of complaint on the grounds that the court had no jurisdiction and that the bill does not state facts sufficient to constitute a cause of action in equity against the defendants, either jointly or severally, and that it appeared by the plaintiff's bill that it was not entitled to the relief prayed for or any relief. (Rec. p. 5.)

On March 20, 1934, the district court sustained the special motion to dismiss (Rec. p. 6), filing a memorandum opinion setting forth the reasons for sustaining said motion, to-wit, that the matter in controversy did not exceed $3,000.00 for that the policy on the building only amounted to exactly $3,000.00, and that the policy on the personalty only amounted to $1,500.00, and that the personalty policy ran to Pete Di Giovanni alone, whereas the building policy ran to both defendants. The court ruled that the two policies could not be joined because the parties therein were not the same, and that the two policies were separate and distinct contracts, requiring different measures of proof and recovery. (Rec. pp. 10, 11, 12.)

Upon appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the decree of the district court was reversed February 14, 1935, order entered February 18, 1935. (Rec. pp. 12, 18.) The circuit court of appeals handed down an opinion (Rec. pp. 12 to 18) in which it ruled as follows (Rec. pp. 18-19):

"So, in the instant case, plaintiff is seeking to cancel these policies on which, should the defendants successfully maintain actions at law, they will recover $4,500.00, and in the circumstances of this case, the allegations of the bill of complaint being admitted, we think that is the amount in dispute and in controversy between the parties." (Rec. p. 16.) * * * "In the first place, in this case there is a charge of conspiracy, and there are at least two of these policies, so that it would require at least two actions at law and materially increase plaintiff's expenditures in litigation, whereas, the matter, if cognizable in equity, can be disposed of in one suit."

"But there is still a further answer to this contention. The adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court. (Citing cases.)" (Rec. p. 17.)

"Considered as law actions the claims of the defendants are separate, and the amount in controversy cannot be aggregated, so that the plaintiff can secure no remedy at law in the federal trial court, nor, indeed, would an appeal lie from the ultimate decision of the State Supreme Court to the Supreme Court of the United States, because there is no federal question involved, and the parties are private parties." (Rec. p. 17.)

"Plaintiff being free to seek its remedy in the federal court, has a right to insist that the remedy at law which will preclude its right to maintain this suit in equity shall be a remedy in the federal court." (Rec. pp. 17, 18.)

On March 14, 1935, the petitioners filed in the circuit court of appeals a petition for rehearing, and, also, their motion to complete the record, and their suggestions in support thereof. (Rec. pp. 20, 21, 22, 23, 19, 20.) The said motion was denied and the said

petition for rehearing was overruled on March 18, 1935. (Rec. p. 23.)

In the motion to complete the record petitioners moved the court to remit the transcript of the record to the district court below, authorizing and directing said district court to cause to be incorporated therein by way of supplemental record or otherwise, the two insurance policies issued by the respondent and referred to in its original bill of complaint and by reference incorporated in said bill as a part thereof. As reasons for the motion, petitioners stated that said policies or exhibits had become material and important in the determination of the appeal, particularly those provisions which provided that other insurance might be carried on the property, *and that the appellant insurance company should be liable only for its proportionate part of the entire loss,* and that the transcript of record as then filed in said circuit court of appeals failed to include said Exhibits "A" and "B" (the insurance policies) referred to in its bill. (Rec. p. 19.)

The precise points involved are these:

1. If the real subject matter of a bill in equity is cancellation of a nonnegotiable instrument and to prevent filing of a threatened suit or suits at law thereon *in a state court,* which suits would not be removable to a federal court, and the facts stated in the bill in equity would constitute a complete defense at law in said suit or suits in the state court, is an equity suit maintainable in the federal court on the ground that there is no adequate remedy at law in the federal court?

2. Is there a multiplicity of suits involved where the judgment in either of the two threatened suits would be *res judicata* and preclude recovery in the other suit, neither of said threatened suits having been filed at the time the bill in equity was filed?

3. Can an insurance company by charging a conspiracy to defraud, tie together two claims arising under two separate contracts of insurance, one covering real property and the other personal property, aggregating the amounts of the two claims so as to make the required amount for federal jurisdiction?

4. Where the face amount of the policies exceeds $3,000.00 but the bill of complaint on its face shows that the actual loss and liability is less than $3,000.00, is the jurisdictional amount of a federal court involved?

IV.

SPECIFICATION OF ERRORS.

(1)

The Circuit Court of Appeals for the Eighth Circuit erred in overruling petitioners' motion to complete the record.

(2)

The Circuit Court of Appeals for the Eighth Circuit erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

(3)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(4)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

(5)

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

V.

BRIEF SUMMARY OF ARGUMENT.

POINT A.

The circuit court of appeals erred in overruling petitioners' motion to complete the record.

Argued under Point D.

POINT B.

The circuit court of appeals erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

(a)

Bills to cancel instruments and enjoin nonremovable state court suits thereon will not lie, where the bill discloses an adequate defense assertable in the state court suits. This is the spirit of statutes prohibiting injunctions of state court suits, or suits in equity where there is an adequate remedy at law, and safeguards of the right to jury trial. To hold otherwise will render innumerable state court suits convertible into federal equitable suits for cancellation. 36 Stat. 1162, 1163, 7th Amend. Constitution.

(b)

No bill for cancellation states a cause of action unless reasonable ground for apprehension of injury is alleged. No such ground exists where a complete defense will annihilate the suit in the only court in which it can be brought, the state court. A bill to cancel is a bill *quia timet*—"because he fears." If he has nothing to fear, he has no equitable cause of action. That is why bills to cancel matured notes, leases, and insurance policies do not lie, except under extraordinary circumstances. Story's Eq. Jur. (14th Ed.), Vol. 2, Secs. 935, 936, 948, 949, pp. 313, 316, 330; Bispham's Prin. of Eq. (9th Ed.), Secs. 474, 568, pp.

751, 852; Hogg on Eq. Princ., Sec. 45, p. 80; Tiedeman on Eq. Jur., Secs. 539, 540, pp. 632, 633; Encyc. of Pl. & Pr., Vol. 3, p. 599; *Holland* v. *Challen*, 110 U. S. 15; *Russell* v. *Clark's Exec.*, 7 Cranch. 69, l. c. 89; *Cable* v. *Ins. Co.*, 191 U. S. 288; *Butler* v. *Durham*, 2 Ga. 413; *Babcock* v. *Rieger*, 58 S. W. (2d) 722, 332 Mo. 538; *Babcock* v. *Rieger*, Case No. 16651 (K. C. App.), appendix.

(c)

This court has announced these principles in cases removable to the state courts. *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288. However, the opinions were based on general propositions and were not predicated simply on the fact that the case there considered could be filed in or removed to the law side of the federal courts. *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379; *Scottish U. & N. Ins. Co.* v. *Bowland*, 196 U. S. 611; *Pioneer Pyr. Life Ins. Co.* v. *Hughey*, 76 F. (2d) 524 (C. C. A. 4); *Niagara Fire Ins. Co.* v. *Adams*, 198 F. 822 (C. C. A. 1); Contra, *Mass. Prot. Ass'n* v. *Stephenson*, 5 F. (Supp.) 586 (D. C. Ky.); Pomeroy's Eq. Jur. (4th Ed.), Vol. 5, Sec. 2107, p. 4750, Note 55.

(d)

Paragraph 16 of the First Judiciary Act, September 24, 1789, 1 Stat. 82, prohibits maintenance of a suit in equity where there is an adequate remedy at law. Paragraphs 11 and 12 deal with cases over which the state and federal courts have concurrent jurisdic-

tion, and over removable and nonremovable state court cases. The prohibition should be held applicable to all cases previously mentioned, to-wit, nonremovable as well as removable cases. It is illogical to twist the provision making certain state court cases nonremovable to the federal courts into a ground for filing a bill on the equity side of the federal court.

(e)

The decisions have noted frequent exceptions to the rule that the adequate remedy at law which precludes a federal suit in equity, must be in the federal courts. *Porter* v. *Investors Syndicate*, 286 U. S. 461; *Matthew* v. *Rogers*, 284 U. S. 521; *Graham* v. *Rd.*, 118 U. S. 161; *Phillips* v. *Negley*, 117 U. S. 665; *Boise Artesian H. & C. Water Co.* v. *Boise City*, 213 U. S. 276; *Prentis* v. *Atl. Coast Line Co.*, 211 U. S. 210. Instances of an adequate remedy at law in a nonremovable state court case simply constitute another exception.

(f)

Decisions referring to classes of cases over which equity has always exercised jurisdiction according to "established principles" (*Smyth* v. *Ames*, 169 U. S. 466) are inapplicable to a bill *quia timet*, where from the beginning equity has refused jurisdiction in the presence of an adequate remedy at law in whatever court the threatened suit is triable.

POINT C.

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits, or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

(a)

This bill, measured as a bill of peace, cannot be maintained to prevent vexatious litigation, for the complainant's asserted right has never yet been established at law. *Butler* v. *Durham, supra; Babcock* v. *Rieger, supra; Holland* v. *Challen, supra; Pac. Mut. Life Ins. Co.* v. *Parker,* 71 F. (2d) 872, 876 (C. C. A. 4); 21 Corpus Juris, Sec. 50, pp. 76, 77, 78. There is nothing in the bill disclosing anything except that petitioners seek an adjudication at law of their right to collect the insurance.

(b)

There is no multiplicity of suits involved, for the suit on the building policy would be *res judicata* of the suit on the personalty. Even if the personalty suit is tried first, it will be *res judicata* in the suit on the building, for if petitioner, Pete Di Giovanni, loses in the personalty suit, he and his wife, as tenants by the entirety, cannot recover in the suit on the realty. *Stifel's Union Brewing Co.* v. *Saxy,* 273 Mo. 159, 201 S. W. 67; *Fulbright* v. *Phoenix Ins. Co.,* 329 Mo. 207, 44 S. W. (2d) 115; *Boise Artesian H. & C.*

Water Co. v. *Boise City*, 213 U. S. 276; *Hipp* v. *Babin*, 19 Howard 271, 279; *Ins. Co.* v. *Bailey, supra; Niagara Fire Ins. Co.* v. *Adams, supra; Pioneer Pyr. Life Ins. Co.* v. *Hughey, supra; N. Y. Life Ins. Co.* v. *Marshall*, 21 F. (2d) 172, affd. 23 F. (2d) 225 (C. C. A. 5); *Pac. Mut. Life Ins. Co.* v. *Parker, supra.*

POINT D.

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(a)

Under these policies, complainant was only liable (with other insurers) for its proportion ($2,700.00) of the total loss, which it alleged was $6,000.00. The record should have been completed, on motion, to show the policy provisions to this effect. *Grand Chute* v. *Winegar*, 15 Wall. (U. S.) 373, 376; Federal Equity Rule 76; *Fairbanks, Morse & Co. et al.* v. *American Valve & Meter Co. et al.*, 276 U. S. 305; *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372; *Hobbs* v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2); Rule 23 of 8th Circuit Court of Appeals; Rule 13, Par. 9 of this court. Fed. Eq. Rule 76. Hence, the jurisdictional amount was not involved. The amount of the loss is the amount involved. *N. Y. Life Ins. Co.* v. *Johnson*, 255 F. 958 (C. C. A. 8); *Schacker* v. *Ins. Co.*, 93 U. S. 241; *Ex parte Phoenix Ins. Co.*, 117 U. S. 367; *Mechanics Ins. Co.* v. *Dist. Co.*, 173 F. 888 (C. C. A.

8); *Wisconsin Central Ry. Co.* v. *Ins. Co.*, 123 F. 989 (C. C. Wisc.); *Norton* v. *Larney*, 266 U. S. 511; *Smith* v. *McCullough*, 270 U. S. 456.

(b)

The point is debatable. *Schunk* v. *Moline, Milburn & Stoddard Co.*, 147 U. S. 500; *In re Reisenberg*, 208 U. S. 90. The question is not the amount in dispute in the threatened suits on the policies, but the amount involved in a bill to cancel documents, where the bill in effect concedes that complainant will lose less than $3,000.00, if the alleged ground of cancellation is not sustained.

POINT E.

The circuit court of appeals erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

(a)

The general rule is separate claims cannot be tied together. *McDaniel* v. *Traylor*, 196 U. S. 415, involved a conspiracy to fasten John Evans' debts onto Hiram Evans estate. Of course, the amount involved was the total of John Evans' debts. *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, involved a conspiracy to ruin complainant by numerous meritless suits. The singleness of the object tied the claims together. The two policies

here were issued simultaneously, covering property in the same location, subject to destruction by the same fire, and named Pete Di Giovanni one of the insured in each policy. Under such circumstances, the insurer's agreement to separate policies is equivalent to an agreement that ordinary defenses, whether in procurement or otherwise, should be dealt with separately, too.

VI.

ARGUMENT.

POINT A.

(Specification 1.)

The Circuit Court of Appeals Erred in Overruling Petitioners' Motion to Complete the Record.

The argument under this point logically falls in with the argument under Point D and will be found there.

POINT B.

(Specification 2.)

The Circuit Court of Appeals Erred in Ruling That Complainant Could Maintain Its Bill in Equity Because It Would Have No Adequate Remedy at Law in the Federal Court in the Event Separate Suits Were Filed on the Policies in the State Court.

(a)

The complainant's bill alleges that two suits were threatened, namely, one on the $3,000.00 policy on the building, and the other on the $1,500.00 policy on the personalty. Neither of these suits would be removable to the federal court. Although the alleged fraud set up in the complainant's bill of complaint would constitute a complete defense *in the state court*, yet the circuit court of appeals held that fact immaterial for the reason that complainant had no adequate remedy at law or defense *assertable in the federal court*.

If this is so, then every state court suit for small installments due on policies whose face amount exceeds $3,000.00 (*Wright* v. *Ins. Co.*, 19 F. (2d) 117 (C. C. A. 5) 276 U. S. 602) and every case where two policies combined issued by the same company together exceed $3,000.00 may be converted into a federal equity suit for cancellation, depriving the insured of a jury trial.

The rule that the complainant must have an adequate remedy at law *in the federal court* has no application to cases where the active subject matter of the bill (really a bill of peace or *quia timet*) and the "great object" (91 U. S. 254, 257) thereof are to restrain prosecution of threatened suits at law, themselves cognizable only by state courts. Certainly to so apply the rule would run counter to the spirit and public policy which underlie, 36 Stat. 1162, 28 U. S. C. A., Sec. 379, which prohibits federal courts from enjoining proceedings already pending in state courts, and 36 Stat. 1163, 28 U. S. C. A., Sec. 384, which denies equity jurisdiction to federal courts when there is an adequate remedy at law, and to the Seventh Amendment to the Constitution which preserves in federal courts the right to trial by jury in cases involving more than $20.00.

(b)

If one sues in equity to enjoin prosecution of threatened suits at law in a state court, surely, to state a cause of action in equity, he must demonstrate in his bill that there is a real cause for apprehension of injury on his part. In considering whether or not the alleged danger is actual or whether it is only illusory, the

decisive test must be whether the defense is assertable *in the very forum where the danger is alleged to exist.* If such a threatened suit or suits could not be removed to the federal court, then clearly the only question is whether the defense is assertable in the state court.

If a wild animal is confined to a certain cage, no one has the right to complain that this animal is dangerous, merely by asserting that he cannot defend himself against it or slay it at some other place, where it can never be. If the monster that the complainant seeks to decapitate by its bill can only rear its head in the state court, then in ascertaining whether or not it really is a monster or whether it is merely a myth (so far as danger is concerned) it is beside the point whether or not the sword that can render it harmless can be thrust in the federal court, where this monster can never appear. The question is whether a confined apparition can be dispelled in the only place where it is claimed it will appear or ever can appear, not whether it can be destroyed in a place where no one even claims it can ever possibly appear to frighten or injure the complainant. If one files a bill to abate a nuisance in Washington, D. C., in determining whether or not he has stated a cause of action, the only question is whether the alleged nuisance really constitutes a nuisance in the place that it actually is and will remain, not whether it would be a nuisance if in some other place where it never can be.

Where the subject of a bill for equitable relief is peculiarly a suit or suits at law which can only be filed in a

state court, then no possible injury can flow therefrom, if a complete defense can be asserted in that state court, and it does not state a cause of action for equitable interference. *Strictly speaking, the point involved is not whether there is an adequate remedy at law or not. The proposition really is that no cause of action is stated in equity because no real danger or injury necessitating equitable interposition is disclosed under the pleaded circumstances.* The alleged poison is disclosed to carry along with a complete antidote neutralizing it wherever the poison may appear or its use be attempted.

It has never been supposed that the mere fact that one wrongfully held an instrument entitled another to maintain a bill for its cancellation. The entire doctrine of cancellation is referable to the original equitable bill *quia timet*—"because he fears," a protective, preventive writ, never issued unless demanded by special circumstances constituting reasonable grounds to apprehend substantial, irretrievable injury. Story's Eq. Jur. (14th Ed.), Vol. 2, Secs. 935, 936, 948, 949, pp. 313, 316, 330; Bispham's Prin. of Eq. (9th Ed.), Secs. 474, 568, pp. 751, 852; Hogg on Eq. Prin., Sec. 45, p. 80; Tiedeman on Eq. Jur., Secs. 539, 540, pp. 632, 633; Encyc. of Pl. & Pr., Vol. 3, p. 599; *Holland* v. *Challen*, 110 U. S. 15. The bill cannot be misused to gain a strategic advantage. *Russell* v. *Clark's Exec.*, 7 Cranch. 69, 89; *Cable* v. *Ins. Co.*, 191 U. S. 288. Thus, such a bill will not lie to cancel matured notes, leases or other nonnegotiable contracts, the actual establishment of which need never be feared. *Butler* v. *Durham*, 2 Ga. 413; *Babcock* v. *Rieger*, 58 S. W. (2d) 722, 332 Mo. 538; *Babcock* v. *Rieger*, Case No. 16651

(K. C. App.), see appendix; cases cited under (c) *post*. In insurance cases where loss has occurred the policy as such is unimportant, for it has become a "mere legal demand" for money, triable in the usual manner. *Continental Cas. Co.* v. *Yerxa*, 16 F. (2d) 473, and cases cited (D. C. Mass.).

(c)

This court has ruled that where the threatened suits at law would be removable to the federal court, then no bill in equity will lie.

Cable v. *United States Life Ins. Co.*, 191 U. S. 288. However, the decisions seem to rest on the fundamental principles adverted to above, and not on the possibility there present of the federal court acquiring the threatened suits at law.

Insurance Co. v. *Bailey*, 13 Wall. 616.
Grand Chute v. *Winegar*, 15 Wall. 373.
Enelow v. *N. Y. Life Ins. Co.*, 293 U. S. 379.
Scottish U. & N. Ins. Co. v. *Bowland*, 196 U. S. 611.
Pioneer Pyr. Life Ins. Co. v. *Hughey*, 76 F. (2d) 524 (C. C. A. 4).
Niagara Fire Ins. Co. v. *Adams*, 198 F. 822 (C. C. A. 1).
Contra, *Mass. Prot. Ass'n* v. *Stephenson*, 5 F. (Supp.) 586 (D. C. Ky.).

The writer of the notes to the Fourth Edition of Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 2107, p. 4750, Note 55, has this to say about it:

"Some federal courts have found support for assuming jurisdiction on the extraordinary ground

that the action to which complainant would be called upon to make defense might be an action in a state court. *Mutual Life Ins. Co.* v. *Pearson*, 114 Fed. 395, 397; *United States L. Ins. Co.* v. *Cable*, 98 Fed. 761, 763, 39 C. C. A. 264; *Mutual Life Ins. Co.* v. *Blair*, 130 Fed. 971. These cases have been practically overruled, however, in the late case of *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74."

No doubt the reference in the above quotation was to the following language of this court in the opinion in the *Cable Case* (l. c. 78):

> "Where a plaintiff in a state court which has jurisdiction over the subject matter brings the defendant properly within such jurisdiction, he is entitled to a trial of his cause in that court, unless the case be removed to a federal court upon some constitutional ground. If that ground exists, the removal can be made, but if it do not, equitable jurisdiction does not accrue to a federal court because it is thought the law as administered by that court is more favorable to the party seeking its aid."
> *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288.

(d).

Sec. 16 of the Act of September 24, 1789, 1 Stat. 82 (now with unimportant changes Sec. 267 of the Judicial Code, 36 Stat. 1163), is as follows:

> "And be it further enacted, that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

In the same statute Congress specifically defined the cases in which the state courts and the federal courts

had concurrent jurisdiction. It also dealt in terms with cases removable to the federal courts and cases not removable from the state courts. (See Appendix.) It is inconceivable that Congress in denying federal jurisdiction over nonremovable state court cases, intended that very prohibition in and of itself to constitute a ground of federal equitable jurisdiction over substantially the same controversy. It is more reasonable to construe the prohibition of the statute quoted, to be coextensive with the cases expressly mentioned in the same Act, to-wit, nonremovable, as well as removable, cases.

(e)

This court has noted several exceptions to federal equitable jurisdiction, on the ground that there were adequate remedies in the state law courts; for example, revenue enforcement cases, rate enforcement cases, state court judgments, and habeas corpus proceedings. *Porter* v. *Investors Syndicate*, 286 U. S. 461; *Matthew* v. *Rogers*, 284 U. S. 521; *Graham* v. *Rd.*, 118 U. S. 161; *Phillips* v. *Negley*, 117 U. S. 665; *Boise Artesian H. & C. Water Co.* v. *Boise City*, 213 U. S. 276; *Prentis* v. *Atl. Coast Line Co.*, 211 U. S. 210. The precise question having arisen, it seems appropriate to distinctly include among the exceptions, bills for cancellation, where there are no exceptional circumstances present.

(f)

Decisions in classes of cases always cognizable in equity according to "the established principles and rules of equity" (*Smyth* v. *Ames*, 169 U. S. 466), up-

holding the right of the complainant to choose the federal court as his forum, have no application to the bill *quia timet* involved here, falling within a class of cases over which equity irrespective of forum under "established principles" has consistently refused to exercise jurisdiction.

POINT C.

(Specification 5.)

The Circuit Court of Appeals for the Eighth Circuit Erred in Holding There Was Equitable Jurisdiction in the Case at Bar Because of Multiplicity of Suits, or Because of a Threatened Multiplicity of Suits, for the Reason That a Judgment in Favor of the Complainant in Either of Said Threatened Suits Would Be a Complete Bar to Recovery in the Other.

(a)

This bill cannot be sustained on the familiar ground of preventing vexatious or other misuse of the instruments, such as to embarrass, harass, irritate or annoy, using the terms in a substantial sense; for there is nothing here to indicate that petitioners seek anything more than an adjudication of their right to collect for their losses, or that once the common issue is determined, they will groundlessly repeat, protract or renew the litigation. To maintain a bill of peace, it is essential that complainant's right be first established at law. *Butler* v. *Durham, supra; Babcock* v. *Rieger, supra; Holland* v. *Challen, supra; Pac. Mut. Life Ins. Co.* v. *Parker*, 71 F. (2d) 872, 876 (C. C. A. 4); 21 Corpus Juris, Sec. 50, pp. 76, 77, 78.

(b)

But in no event can there be a multiplicity of suits here. It will be observed that Pete Di Giovanni must be one of the plaintiffs in each suit. If the suit on the building policy, in which both Pete Di Giovanni and his wife are plaintiffs, were tried first, then the judgment in that suit would be *res judicata* against Pete Di Giovanni, so that there would be no danger to apprehend from the second suit, and there would be no multiplicity of suits or no further suit to try, as a matter of fact.

There is no presumption that the case on the personal property policy will be tried before the case involving the building policy; yet it must be assumed, in order to justify a bill in equity, that the case to be brought by the husband alone on the personalty policy will be tried first. Under the facts pleaded in this bill both suits would be filed at the same time and tried at the same time. Certainly until it is alleged and actually appears that the suit of the husband alone is going to be tried first, there is no reason to surmise that that will be done. The defendant will have the same control over the cases in the state court as the plaintiffs. *Cable v. Ins. Co.*, 191 U. S. 309. No doubt, on suggestion, the state court would direct the case in which both petitioners are plaintiffs to be tried first. It will be time enough to file a bill in equity to prevent a multiplicity of suits when it actually appears that there will be a multiplicity of suits, not merely that there is a remote theoretical possibility of same.

(c)

But let us suppose that Pete Di Giovanni's suit on the policy covering the personalty is tried first and he is defeated. If he is there defeated, the suit on the policy covering the building cannot be maintained. For that suit must be maintained by *husband and wife*, as tenants by the entirety. Neither can recover singly.

But as plaintiff, Pete Di Giovanni, is barred from recovering, the liability as to him being *res judicata*, there can be no joint recovery. It is the risk the wife took in accepting title as a tenant by the entirety. *Stifel's Union Brewing Co.* v. *Saxy*, 273 Mo. 159, 201 S. W. 67; *Fulbright* v. *Phoenix Ins. Co.*, 329 Mo. 207, 44 S. W. (2d) 115.

Boise Artesian H. & C. Water Co. v. *Boise City*, 213 U. S. 276.
Hipp v. *Babin*, 19 Howard 271, 279.
Ins. Co. v. *Bailey*, *supra*.
Niagara Fire Ins. Co. v. *Adams*, *supra*.
Pioneer Pyr. Life Ins. Co. v. *Hughey*, *supra*.
N. Y. Life Ins. Co. v. *Marshall*, 21 F. (2d) 172, af'd 23 F. (2d) 225 (C. C. A. 5).
Pac. Mut. Life Ins. Co. v. *Parker*, *supra*.

POINT D.

(Specification 3.)

The Circuit Court of Appeals for the Eighth Circuit Erred in Holding That the Jurisdictional Amount of $3,000.00 Was Involved in View of the Fact That the Actual Liability of Complainant under Both Policies Would Only Total $2,700.00.

(Point A, involving the motion to complete the record by showing the policies sued on, is argued under this heading, also.)

(a)

The bill alleges the following policies of fire insurance on the building:

$ 3000.00	Camden Fire Ins. Association	5-15-33
2000.00	Eureka Security, etc.	5-26-33
2500.00	Eureka Security, etc.	5-13-33
2500.00	St. Louis Fire & Marine Ins. Co.	5-13-33
5000.00	Old Colony	4- 5-33
$15000.00		

Complainants' insurance policy of $3,000.00 on the building was one-fifth of the total fire insurance on the building. Complainant alleged in the bill that the building was of a value not to exceed $6,000.00. On motion to dismiss, this allegation must be taken as true.

Grand Chute v. *Winegar*, 15 Wall. (U. S.) 373, 376.

One-fifth of the total loss of $6,000.00 is $1,200.00. Adding to this $1,200.00, the full amount of the policy on the personal property, to-wit, $1,500.00, the total loss of respondent under its own bill in equity cannot possibly exceed $2,700.00. Therefore, the jurisdictional amount is not involved.

In order to show that respondent's policies referred to in its bill in equity each contained a provision that the insurer was only to be liable for such proportion of any loss as the amount of the policy bore to the whole amount of fire insurance applying, whether such other insurance contained a similar clause or not, peti-

tioners filed their motion in the United States Circuit Court of Appeals for completion of the record, filing the original policies with the clerk of said court. If the point we are making is meritorious, then the circuit court of appeals should have sustained said motion.

Federal Equity Rule 76.

Fairbanks, Morse & Co. et al. v. *American Valve & Meter Co. et al.*, 276 U. S. 305.

Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372.

Hobbs v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2).

Rule 23 of 8th Circuit Court of Appeals.

Rule 13, Par. 9 of this court.

At our request the original policies have been transmitted to the clerk of this court. We quote from said policies as follows:

"3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance applying whether such other insurance contains a similar clause or not."

Policy No. 910156.

"3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance

applying whether such other insurance contains a similar clause or not."

Policy No. 910254.

It is not the amount claimed in a prayer for relief, or which complainant says in its pleading is involved, that determines the jurisdiction of the federal court if the "unmistakable fact and legal certainty be" that a lesser amount is involved. The amount of loss is the amount involved, after fire. *N. Y. Life Ins. Co.* v. *Johnson*, 255 F. 958 (C. C. A. 8); *Schacker* v. *Ins. Co.*, 93 U. S. 241. Nor does the amount of liability on the policies issued by the other insurers increase the amount involved here. *Ex parte Phoenix Ins. Co.*, 117 U. S. 367; *Mechanics Ins. Co.* v. *Dist. Co.*, 173 F. 888 (C. C. A. 8); *Wisconsin Central Ry. Co.* v. *Ins. Co.*, 123 F. 989 (C. C. Wisc.).

Furthermore, the bill of complaint affirmatively alleged that the building was not a total loss Since there is no allegation of the amount of the loss to the building, it is impossible to ascertain how much damage there was thereto. It might only have been nominal damage. Consequently, the jurisdiction of the court has not been made affirmatively and distinctly to appear. *Norton* v. *Larney*, 266 U. S. 511; *Smith* v. *McCullough*, 270 U. S. 456.

(b)

We frankly admit that the point we are here making is debatable. This court has held that in an ordinary action the amount claimed is the amount in

dispute. *Schunk v. Moline, Milburn & Stoddard Co.*, 147 U. S. 500; *In re Reisenberg*, 208 U. S. 90.

The question here is not what amount would be involved in the threatened suits at law on the policies. The question here is what amount is involved in a suit to cancel instruments, where the bill necessarily concedes that if the asserted ground of cancellation is not sustained the complainant will nevertheless suffer a loss of only $2,700.00.

POINT E.

(Specification 4.)

The Circuit Court of Appeals Erred in Holding That the Two Claims Arising under the Two Policies of Insurance Issued by It Could Be Tied Together by the Charge of Concerted Design and Action to Defraud, for the Purpose of Ascertaining the Amount Involved for Jurisdictional Purposes.

(a)

Concededly, the general rule is that separate claims cannot be tied together. The circuit court of appeals thought that the instant case fell within the rulings of two exceptional decisions of this court.

The first of the cases was *McDaniel* v. *Traylor*, 196 U. S. 415. This case involved a situation where conspirator creditors in league with the administrator of an estate had fraudulently proved and procured to be allowed in probate court illegal claims. The essence of the conspiracy was to fix on the estate of

Hiram Evans, deceased, the debts of John Evans, which the defendants, except the administrator, held. The single object, to-wit, to fasten John Evans' liabilities on Hiram Evans' estate, schemed at by all of the defendants, was quite properly measured as an entirety, and the amount involved was the total amount of John Evans' debts. This would have been true whether John Evans' debts were all held by one claimant or by many claimants.

In *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, the alleged object of the conspirators was to ruin the defendant by numerous meritless suits, the defense of which entailed enormous expense. The real object was not to collect the various separate amounts sued for in said meritless suits. The main and controlling objective of these numerous suits being simply to ruin the defendant corporation, and that being the common object of the conspiracy (the suits being merely the device or overt acts resorted to in order to accomplish the main object), this court ruled that the singleness of the main object tied the incidental claims together into one.

These two cases properly analyzed bear no analogy to the case at bar. In the case at bar there is no single objective which ties these claims together. Here are involved just two insurance policies and two proposed suits at law, each to collect on one of the pol-

icies, with no further underlying objective. There is nothing exceptional in the circumstances of this case to tie the claims together, except that they had a common origin. It could just as well be urged that whenever a man, even in the best of faith, takes out two fire policies on the same property, that his object is to collect just a single compensation in the event of a fire, and that, consequently, the amount involved is that single sum. The case at bar falls within the rule often applied that common origin does not tie the claims together. It does not fall within the exception that where there is a single, controlling, ulterior objective, participated in by all of the parties involved, that then the claims will be tied together.

(b)

The two policies in question here were issued simultaneously, covering property in the same location, subject to damage by the same hazard, and with one of the petitioners designated as one of the insured in each policy. Much in this situation tied the insurance together at the outset. Nevertheless the insurer voluntarily divided same into separate contracts. It should be held estopped after loss to tie them together simply for the purpose of asserting defenses thereto, whether in procurement or in application, these being defenses so usual in insurance cases as to be deemed within the contemplation of the parties when the policies were written. In neither of the above decisions was there

any original bond or connecting relation in the subject matter of the claims or between the claimants, nor was there any conduct of the complainant equivalent to an agreement that the claims should stand on separate footings for all ordinary purposes.

Respectfully submitted,

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APPENDIX.

(a)

Babcock v. *Rieger, No.* 16651.

The first opinion in this litigation was written by Commissioner Barnett for the Kansas City Court of Appeals of Jackson County, Missouri. It was never reported because the Supreme Court of Missouri on a writ of certiorari quashed the record of the Kansas City Court of Appeals on the ground that it had no jurisdiction over the appeal. (*State ex rel. Babcock* v. *Trimble et al.*, 326 Mo. 702, 32 S. W. (2d) 760.) When the Supreme Court passed on the merits of the case it sustained the conclusions reached in the unreported opinion of the Kansas City Court of Appeals. (*Babcock* v. *Rieger*, 58 S. W. (2d) 722.) For the reason that the facts are so fully set out in the reported cases, we omit same and only quote here the pertinent portions of the opinion of the Kansas City Court of Appeals, as follows:

> "Appellant contends that the court erred in trying this cause as a suit in equity upon the ground that a judgment for defendants in the action at law instituted by the plaintiff would have afforded defendants all the relief to which they were entitled. Respondent makes the following contention: 'Where an answer sets up an estoppel *in pais* entitling defendant to affirmative relief and praying such relief the case is converted into one in equity.' 'Cancellation is an exclusive remedy of equity.' 'An adequate remedy at law does not exist where, although suit is pending on an instrument, same may be dis-

continued at will by plaintiff.' 'A lease will be cancelled by a court of equity where it appears the lessor, although obligated to repair in case of fire, has failed to do so within a reasonable time, which failure has caused lessee to make other arrangements.' 'Equity will cancel an instrument which, for some cause, either legal or equitable, has become *functus officio* and liable to misuse in the hands of plaintiff.' All of these contentions are based upon language to be found in various decisions cited by the respondents; but they have all been lifted from their settings, placed in an artificial juxtaposition, and applied to an action on a cross bill which presents none of the grounds for equitable relief which existed in those cases where the language was used. No one doubts that if an equitable defense is set up in a cross bill entitling defendant to affirmative relief, coupled with a prayer for such relief, then the whole case is converted into a suit in equity, although the petition stated a cause of action at law. But a prayer for affirmative equitable relief amounts to nothing unless defendant is entitled to such relief according to the allegations of his bill. Of course, the cancellation of instruments, including the cancellation of leases, can only be had in equity; but a prayer for cancellation, like any other prayer for equitable relief, must be coupled with allegations showing a right thereto.

The contention that respondents had no adequate remedy at law because plaintiff's suit might be discontinued at will is bottomed on the citation of *Begley* v. *Mississippi Valley Trust Co.*, 252 S. W. 84. In that case the cross-bill contained all the allegations essential to a good bill of peace. The court stated that the intention of the holder of the note to institute and dismiss and reinstitute suits thereon and thereby harass the parties against whom the alleged note was asserted was not left to conjecture. The plaintiff had sued the defendants in Butler County where defendants resided. Plaintiff

then brought another suit upon the same cause of action in the City of St. Louis. Then, after defendants had filed an answer and counterclaim in Butler County and that case was set for trial, plaintiff dismissed that action. It has always been held that a court of equity will entertain a bill of peace to enjoin the vexatious or malicious institution of repeated suits on the same cause of action. 21 C. J. 76. But a bill of peace should allege that plaintiff has vexatiously instituted, dismissed, and reinstituted the same cause of action, or that plaintiff has continued to institute suits upon a cause of action which has once been adjudged against him, or has repeatedly brought a form of action wherein the judgment is not *res adjudicata*, such as ejectment, for the purpose of harassing or annoying the defendant. In the absence of such an allegation it amounts to nothing to allege that defendants are or may be harassed by further litigation. Except for the necessity of the allegation of actual oppressive litigation, together with the proof thereof, any action at law could be converted into a suit in equity at the election of the defendant.

The claim that a lease will be cancelled by a court of equity, where it appears that the lessor although obligated to make repairs after fire has failed to do so, is bottomed on the citation of *Lincoln Trust Co.* v. *Nathan*, 175 Mo. 32. In that case the lease provided that lessor should make repairs or rebuild in the event of damage by fire, but there was no express provision that the failure to perform this covenant would terminate the lease. The general common law rule is that a lessee is not relieved of the obligation to pay rent for the full term of a lease if, during the term, the leased property be destroyed by fire. The court held that in such case equity would decree a forfeiture of the lease because the covenants to pay rent and to rebuild after a fire were dependent upon each other and it would be against good conscience to permit the landlord to violate the contract on his part and still require

performance of the contract by the lessee. It is clear that that case does not support respondent's contention. In the Lincoln Trust Company case the lessee was in good conscience entitled to rescission of the lease, but that relief could not be afforded by a court of law.

In the instant case defendants allege that by reason of certain facts the lease has terminated according to the express provisions of the instrument. If that be true cancellation would be a useless thing. If respondent proved these facts he was entitled to a favorable verdict at the hands of a jury. A judgment based upon that verdict would have conclusively established defendant's claim that the lease no longer existed. Furthermore, the judgment would have been full protection against any further litigation whether instituted by the plaintiff or anyone claiming under him. Plaintiff, being the owner of the lease and of the claim for rent thereunder at the time the case was tried, could not have invested any assignee with any claim against which this judgment would not have been conclusive. *Brady* v. *Kirby et al.*, decided by this court at this term and not yet published. (Now published, 22 S. W. (2d) 52.)

The claim that the cross bill states a cause of action for equitable relief because it prays for the cancellation of the instrument is buttressed with the further suggestion that courts of equity have a concurrent jurisdiction with courts of law in matters of fraud, accident and mistake. In our opinion there was neither allegation nor evidence of any fraud in this case. Furthermore, while it is true that courts of equity have concurrent jurisdiction to grant relief on account of fraud, yet, the relief granted in equity is different from that granted at law. One who has been misled by fraud into a disadvantageous contract may recover his damages at law; but if he does so he must perform the contract, observe the obligations, and bear the burdens which the contract imposes upon him. Equity does not consider this relief to be fully adequate.

A man should not be compelled to perform a contract which has been procured by fraud. He may, therefore, elect to institute a suit in equity praying a rescission of the contract, which includes the right to pray cancellation of an instrument evidencing the contract. It is plain that such right is not involved in this case. Respondents made the defense that the contract was terminated, and for that reason no further duties were imposed on them. The only cases that have come to our attention where a court of equity has entertained jurisdiction to cancel an instrument which merely imposes upon the defendant an obligation to pay money, are cases wherein the written obligation was negotiable, and therefore, not subject to the defense which might be made against the original party as against a holder in due course, and cases where the contract provided that it should be incontestable after a certain period, and the plaintiff had an absolute right at law to defer instituting an action upon the contract until the instrument had become incontestable according to its terms. It has always been held that when a suit is filed on a note which is no longer negotiable, or upon a contract of insurance which contains no incontestable clause, or in which the incontestable clause has already become absolute by the lapse of time, that the right to defend the action at law is completely adequate. *Berryman* v. *Motor Car Ins. Co.*, 199 Mo. App. 503; *Stalter* v. *Stalter*, 151 Mo. App. 66; *Schuermann* v. *Ins. Co.*, 165 Mo. 641; *Bank of Neelyville* v. *Lee*, 193 Mo. App. 537; *West* v. *Brison*, 99 Mo. 684."

(b)

Act of September 24, 1789.

"Sec. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in

equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided." (1 Stat. 78) (See 36 Stat. 1091.)

"Sec. 12. *And be it further enacted,* That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next

circuit court, to be held in the district where the suit is pending, or if in the district of Maine to the district court next to be holden thereon, or if in Kentucky district to the district court next to be holden therein, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced. And if in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a state other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the state in which the suit is pending; the said adverse (party) shall give such informa-

tion, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district, or if in the district of Maine, to the court next to be holden therein; or if in Kentucky district, to the district court next to be holden therein; but if he is the defendant, shall do it under the same regulations as in the before mentioned case of the removal of a cause into such court by an alien; and neither party removing the cause, shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury." (1 Stat. 79) (See 36 Stat. 1094.)

"Sec. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." (1 Stat. 82) (See 36 Stat. 1163.)

(c)

Federal Equity Rule 76.

"If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript."

(d)

Rule 23 of Eighth Circuit Court of Appeals, Par. 1.

"• • • If, at the hearing, it shall appear that any material part of the record has not been printed,

the court may make such order (including dismissal of the appeal) as may seem proper."

(e)

Rule 13, Par. 9 of Supreme Court.

"• • • If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed or such order made as the circumstances may appear to the court to require."

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 828

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A
CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Respondent's Brief in Opposition to Petition for Writ of Certiorari—

The judgment entered upon a trial of one case would not become res adjudicata and relieve respondent of a trial of the second case because such decision could be appealed, and while the same was pending on appeal the defense of res adjudicata would be unavailable 2

Respondent's petition on its face shows there is $4,500.00 involved and the court of appeals so found. The fact the record may show a defense which will cut down this amount below the jurisdictional amount does not deprive the district court of jurisdiction 3

Authorities Cited

Barry vs. Edmunds, 6 Sup. Ct. Rep. 501, 116 U. S. 550 7

Bodkin vs. Edwards, 255 U. S. 221, 41 Sup. Ct. Rep. 268 2

Merriam vs. Saalfield, 36 Sup. Ct. Rep. 477, 241 U. S. 22 2

Re Metropolitan Railway Receivership, 28 Sup. Ct. Rep. 219, 208 U. S. 90 5

Schunk vs. Moline, Milburn & Stoddard Company, 13 Sup. Ct. Rep. 416, 147 U. S. 500 4

Wetmore vs. Rymer, 18 Sup. Ct. Rep. 295, 169 U. S. 115 5

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners' statement is colored to a considerable extent by their biased viewpoint, but does contain sufficient facts that we do not deem it necessary to make a restatement of the case. Petitioners do, however, advance some new theories and arguments since the opinion of the United States Circuit Court of Appeals was written and which such opinion, therefore, does not deal with. In the hope that we may be of assistance to the court on such new theories and issues, we submit the following brief, relying entirely upon the opinion to refute all other arguments advanced.

The Judgment Entered upon a Trial of One Case Would Not Become Res Adjudicata and Relieve Respondent of a Trial of the Second Case Because Such Decision Could Be Appealed, and While the Same Was Pending on Appeal the Defense of Res Adjudicata Would Be Unavailable.

Petitioners contend that in no case could there be a multiplicity of suits because a judgment in one suit would become *res adjudicata* and constitute a defense to the second suit on the other policy. This contention is clearly fallacious. The defense of *res adjudicata* is available only where there is a final judgment; therefore, an appeal by either party from the judgment in the first case would suspend the judgment and render it unavailing as a defense under the doctrine of *res adjudicata,* since the same would not be a final judgment. In the case of *Bodkin* v. *Edwards,* 255 U. S. 221, 41 Sup. Ct. Rep. 268, this court said, l. c. 268:

> "Bodkin then took a further appeal to this court, the decision of the Circuit Court of Appeals not being final under Section 128 of the Judicial Code (Comp. St. 1120)."

In the case of *Merriam* v. *Saalfield,* 36 Sup. Ct. Rep. 477; 241 U. S. 22, this court declared the law as follows, l. c. 28:

> "But it is familiar law that only a final judgment is *res adjudicata* as between the parties, and it is evident that a decree cannot be *res adjudicata* as against a third party participating in the defense unless it is so far final as to be *res adjudicata* against the defendant himself. Hence, if the decree of September 11th was not final as between appellant and Saalfield, it cannot be *res adjudicata* as

against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is found to be this: that, upon the theory that Ogilvie would be estopped from a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles."

Respondent's Petition on Its Face Shows There Is $4,500.00 Involved and the Court of Appeals So Found. The Fact the Record May Show a Defense Which Will Cut Down This Amount Below the Jurisdictional Amount Does Not Deprive the District Court of Jurisdiction.

Under Point "C" petitioners ingeniously argue that since respondent alleges the building is not worth more than $6,000.00, and since, as petitioners contend, though not sustained by the record, the policies in question contain a provision that in case other insurance was carried respondent would be liable only for its proportionate share, which in this case they charge would cut the liability on one policy to $1,200.00, leaving it, when added to the full amount of the other $1,500.00, at a total of only $2,700.00.

There are numerous answers to this contention. In the first place, the petition reveals that petitioners are demanding the full amount of their policies, or the full $4,500.00. The record reveals that petitioners had $15,000.00 in insurance on the real property involved. (Petitioners' Brief, page 24.) The record also shows that peti-

tioners are demanding full payment of the policy as a part of their scheme to obtain far in excess of the actual value of petitioners' building. (Petition, pages 3 and 4.) It is, therefore, apparent that the amount in dispute is the full value of these policies, or $4,500.00. The fact that on a trial respondent might be able to convince a jury that the property was not worth more than $6,000.00 and that respondent might be able to cut down their liability below the jurisdictional amount in case they are able to successfully establish the defense mentioned, to-wit: that of liability for only a proportionate part of the loss, dependent upon the proportion of respondent's coverage to the entire coverage. Such mere possibilities do not cut down the amount involved. In the case of *Schunk* v. *Moline, Milburn & Stoddard Company*, 13 Sup. Ct. Rep. 416, 147 U. S. 500, this court, in an opinion by Mr. Justice Brewer, declared the law as follows:

> "Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a nonnegotiable note for $2,500.00, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the $2,500.00; and, whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in

advance that that defense will be presented by the defendant, or, if presented, sustained by the court?"

The most favorable statement from petitioners' viewpoint, justifiable by the facts, is that there is some uncertainty as to the amount ultimately recovered being within the jurisdiction of the district court. This, of course, is insufficient for the rule is that the district court has jurisdiction unless it appears to a legal certainty that less than the jurisdictional amount is involved. In the case of *Wetmore* v. *Rymer*, 18 Sup. Ct. Rep. 295, 169 U. S. 115, this court stated the law as follows, l. c. 128:

> "Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant the dismissal of the action for the want of jurisdiction.
>
> The judgment of the circuit court dismissing the action is accordingly reversed, and the cause is remanded with directions to restore the judgment on the verdict."

Furthermore, at the time this action was instituted in the district court, petitioners had made a demand for the full sum of $4,500.00 which respondent had refused. Petitioners cannot now, by admitting they are entitled to less than the jurisdictional amount, deprive the district court of jurisdiction. In the case of *Re Metropolitan Railway Receivership*, 28 Sup. Ct. Rep. 219, 208 U. S.

90, this court stated the law in such a situation as follows, l. c. 107:

> "Although the amount involved in the suit in the circuit court was sufficient, it is insisted now that there was no dispute or controversy in that case within the meaning of the statute, because the defendant admitted the indebtedness and the other allegations of the bill of complaint, and consented to and united in the application for the appointment of receivers. Notwithstanding this objection, we think there was such a controversy between these parties as is contemplated by the statute. In the bill filed there was the allegation that a demand of payment of the debt due each of the complainants had been made and refused. This was not denied and has not been. There was, therefore, an unsatisfied demand made by complainants and refused by defendant at the time of the filing of the bill. We think that where there is a justiciable claim of some right made by a citizen of one state against a citizen of another state, involving an amount equal to the amount named in the statute, which claim is not satisfied by the party against whom it is made, it is a controversy, or dispute, between the parties within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or, mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted, the federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the circuit court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt."

We submit the facts here do not demonstrate to a legal certainty that less than the jurisdictional amount is involved within the rulings, in the case of *Barry* v. *Edmunds*, 6 Sup. Ct. Rep. 501, 116 U. S. 550, where this court said, l. c. 559:

> "The order of the circuit court dismissing the cause on this ground is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said circuit court.'"

At pages 29 and 30 of petitioners' brief, they contend respondent's action is premature; that respondent should have waited until petitioners actually filed their suits and demonstrated the fact they were going to proceed in a way which would entitle respondent to maintain its action in the United States District Court. The fallaciousness of this contention is revealed at page 20 of petitioners' brief where they point out that the United States statutes prevent the District Court of the United States interfering in an action in the state court where the same

is already pending. In other words, they insist respondent should delay its action in the United States District Court until such action could not be maintained therein. By their inconsistency therein, petitioners demonstrate the fallacy of this contention.

The opinion of the United States Circuit Court of Appeals refutes all other arguments advanced by petitioners. It does not refute the arguments we have just answered for the reason such arguments were not made in that court until after the decision and are afterthoughts of petitioners' counsel, which this court should refuse to consider for that reason, as well as the other reasons advanced.

For all the reasons heretofore suggested herein, and the reasons stated in the opinion of the United States Circuit Court of Appeals, we respectfully ask that certiorari herein be denied.

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RESPONDENT'S REPLY BRIEF.

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INDEX

Statement 1

Brief Summary of Argument—

Point I. The primary object sought in respondent's bill is cancellation of these two policies of insurance. This is a matter of original equity jurisdiction and can be defeated only by showing that there is an adequate remedy at law 2

Point II. Unless relief is granted here in equity, two suits at law will be required to settle the issues. It will be less expensive and more convenient to both parties to try the issues of plaintiff's bill in one action in the federal court 2

Point III. Respondent properly joined the policy for $3,000.00 and the policy for $1,500.00 in one bill in equity. The jurisdictional amount was, therefore, involved 3

A. Respondent's bill charges a conspiracy. This constitutes an exception to the general rule. It entitles respondent to have the sums of the two policies aggregated for the purpose of determining jurisdiction 3

B. Respondent had the right to maintain one action in equity in the federal court for cancellation of both policies. There was, therefore, involved the aggregate of these two policies or $4,500.00 and more than the requisite jurisdictional amount 4

Point IV. Respondent has no remedy on the law side of the federal court which is the test as to whether there is an adequate remedy at law preventing the exercise of equitable jurisdiction by a federal court.

Seriatim Answer to Petitioners' Points—

Point A. The circuit court of appeals properly overruled petitioners' motion to complete the record 6

Point B. The circuit court of appeals properly held that complainant could maintain its bill in equity because it had no adequate remedy at law in the federal court 6

Point C. The circuit court of appeals properly held there was equitable jurisdiction for cancellation reenforced by the ability to avoid a threatened multiplicity of suits 9

Point D. The bill alleged the face value of the two policies was $3,000.00 and $1,500.00 respectively. The bill alleged petitioners were claiming the total loss and demanding the full face value of the policies. The jurisdictional amount was, therefore, involved 10

Point E. The circuit court of appeals properly held the two claims arising under the two policies of insurance could be tied together for the purpose of ascertaining the amount involved for jurisdictional purposes 11

Argument—

Point I. The primary object sought in respondent's bill is the cancellation of these two policies of insurance. This is a matter of original equity jurisdiction and can be defeated only by showing that there is an adequate remedy at law 12

Point II. Unless relief is granted here in equity two suits at law will be required to settle the issues. It will be less expensive and more convenient to both parties to try the issues of plaintiff's bill in one action in the federal court 16

Point III. Respondent properly joined the policy for $3,000.00 and the policy for $1,500.00 in one

bill in equity. The jurisdictional amount was therefore involved 20

A. Respondent's bill charges a conspiracy. This constitutes an exception to the general rule and entitles respondent to have the sums of the two policies aggregated for the purpose of determining jurisdiction 20

B. Respondent had the right to maintain one action in equity in the federal court for the cancellation of both policies. There was, therefore, involved the aggregate of these two policies for $4,500.00 and more than the requisite jurisdictional amount 24

Point IV. Respondent has no remedy on the law side of the federal court which is the test of whether there is an adequate remedy at law preventing the exercise of equity jurisdiction by a federal court 29

Seriatim Answer to Petitioners' Points—

Point A. The circuit court of appeals properly overruled petitioners' motion to complete the record 34

Point B. The circuit court of appeals properly held that complainant could maintain its bill in equity because it had no adequate remedy at law in the federal court 35

Point C. The circuit court of appeals properly held there was equitable jurisdiction for cancellation reinforced by the ability to avoid a threatened multiplicity of suits 49

Point D. The bill alleged the face value of the two policies was $3,000.00 and $1,500.00 respectively. The bill alleged petitioners were claiming a total loss and demanding the full face value of the policies. The jurisdictional amount was, therefore, involved 55

Point E. The circuit court of appeals properly held the two claims arising under the two policies of insurance could be tied together for the purpose of ascertaining the amount involved for jurisdictional purposes 60

CASES CITED

Allore vs. Jewell, 94 U. S. 506, 511, 24 L. Ed. 260, l. c. 264 ..... 2, 13

American Mills Company vs. American Surety Co., 260 U. S. 360, 364, 43 S. Ct. 149, 151 ..... 7, 39

American Mutual Liability Insurance Company vs. McDonaugh, 61 F. (2d) 558, 563 (U. S. C. C. A. 7th) (Certiorari denied 288 U. S. 602) 8, 45

Baltimore & Ohio Southwestern Railroad Company vs. United States, 220 U. S. 94, 106, 31 S. Ct. 368, 371 .. 4, 27

Banker vs. Ford Motor Company, 69 Fed. (2d) 665, 665 (C. C. A. 3rd) 7, 39

Barber vs. Barber, 21 Howard 591, 16 L. Ed. 226, 229 ..... 5, 32

Barry vs. Edmunds, 6 S. Ct. 501, 116 U. S. 550, 559 .. 10, 57

Beacher vs. Pan-American Life Insurance Company, 73 Fed. (2d) 263, 264 (C. C. A. 5) 11, 59

Bodkin vs. Edwards, 255 U. S. 221; 223, 41 S. Ct. 268, 268 52

Bowley vs. Chicago & N. W. Ry. Co., 68 Fed. (2d) 527 48

Brown vs. Guarantee Trust & Safe-Deposit Company, 128 U. S. 403, 412, 9 S. Ct. 127, 130 ..... 5, 31

Burnet vs. Commonwealth Improvement Company, 287 U. S. 415, 418, 53 S. Ct. 198, 199 ..... 6, 35

Cable vs. United States Life Insurance Company, 191 U. S. 288 43

City Bank Farmers Trust Company vs. Schnader, 291 U. S. 24, 29, 54 S. Ct. 259, 261 ..... 5, 8, 34, 44

City of Dothan, Ala., vs. First National Bank of Dothan, 61 Fed. (2d) 685, 686 ..... 4, 27

City of Walla Walla vs. Walla, 172 U. S. 1, 12, 19 S. Ct. 77, 82 19

Dawson vs. Kentucky Distillers and Warehouse Company, 255 U. S. 288, 296, 41 S. Ct. 272, 275 ..... 8, 46

Davis vs. Wakelee, 156 U. S. 680, 688, 15 S. Ct. 555, 558 ..... 5, 31

First State Bank vs. Chicago, R. I. & P. R. Co., 63 Fed. (2d) 585, 590, 591 (C. C. A. 8th) 3, 18

Fish vs. Kennamer, 37 Fed. (2d) 243, 247 (C. C. A. 10) 5, 30

Fulbright vs. Phoenix Insurance Company, 329 Mo. 207, 44 S. W. (2d) 115 55

Grand Chute vs. Winnegar, 15 Wall. (U. S.) 373, 376, 21 L. Ed. 174 ..... 10, 56

Geneva Furniture Manufacturing Company vs. S. Karpen and Bros., 238 U. S. 254, 35 S. Ct. 788 ..... 4, 28

Hale vs. Allinson, 188 U. S. 56, 72, 77, 23 S. Ct. 244, 250, 252 ..... 3, 17

Healy vs. Ratta, 292 U. S. 263, 271, 272, 54 S. Ct. 700, 704 ..... 7, 10, 36, 58

Henrietta Mills vs. Rutherford County, 281 U. S. 121, 126, 50 S. Ct. 270, 272 ..... 5, 8, 32, 45

Herrel vs. St. Louis-San Francisco Ry. Co., 324 Mo. 38, 23 S. W. (2d) 102 (en banc) 55

Hunt vs. New York Cotton Exchange, 205 U. S. 322, 333, 27 S. Ct. 529, 532 ..... 10, 58

Julian vs. Central Trust Company, 193 U. S. 93, 112, 24 S. Ct. 399, 407 ..... 7, 37

Keaton vs. Little, 34 Fed. (2d) 396, 398 (C. C. A. 10th) 8, 46

Kimel vs. Missouri State Life Insurance Company, 71 Fed. (2d) 921, 924 (C. C. A. 10) 4, 27

Leavenworth Savings and Trust Company vs. Newman, 23 Fed. (2d) 835, 838 (C. C. A. 8) 5, 29

Liberty Oil Company vs. Condon National Bank, 260 U. S. 235, 242, 43 S. Ct. 118, 121 ..... 7, 38

Looney vs. Eastern Texas R. Co., 247 U. S. 214, 218, 38 S. Ct. 460, 462 ..... 7, 38

Louisville, N. A. & C. Ry. Co. vs. Louisville Trust Company, 174 U. S. 552, 567, 19 S. Ct. 817, 822 ..... 2, 12

Lynch vs. United States, 292 U. S. 571, 588, 54 S. Ct. 840, 847 ..... 6, 35

McDaniel vs. Traylor, 196 U. S. 415, 427, 25 S. Ct. 369, 373 24

McDaniel vs. Traylor, 212 U. S. 428, 433, 29 S. Ct. 343, 345 4

Metropolitan Life Insurance Company vs. Dunne, 2 Fed. Supp. 165, 166 (D. C. S. D. N. Y.) 4, 27

Merriam vs. Saalfield, 241 U. S. 22, 28, 36 S. Ct. 477 52

New York Dock Company vs. Poznan, 274 U. S. 117, 123, 47 S. Ct. 482, 485 ..... 6, 35

New York Life Insurance Company vs. Jones, 2 Fed. Supp. l. c. 600, (D. C. N. E. D. N. C.) 4, 26

New York Life Insurance Company vs. Miller, (C. C. A. 8) 73 Fed. (2d) 350 ..... 2, 12

Oelrichs vs. Williams, 15 Wall. 211, 228, 21 L. Ed. 43, l. c. 44 ..... 2, 15

Pennsylvania vs. West Virginia, 262 U. S. 553, 593, 43 S. Ct. 658, 663 ..... 7, 40

Providers' Mutual Life Insurance Company of Philadelphia vs. Parsons, 70 Fed. (2d) 863, l. c. 864 (C. C. A. 4th) 4, 24

Put-in-Bay W. L. & R. Co. vs. Ryan, 181 U. S. 409, 431, 21 S. Ct. 709, 717 ..... 10, 59

Rich vs. Braxton, 158 U. S. 375, 405, 15 S. Ct. 1006, 1017 ..... 2, 13

Risty vs. Chicago, R. I. & P. Ry. Co., 270 U. S. 378, 388, 46 S. Ct. 236, 240 .....5, 8, 9, 33, 44, 46

Schunk vs. Moline, Milburn & Stoddard Company, 13 S. Ct. 416, 147 U. S. 500, 504 .....10, 56

Shane vs. West Coast Life Insurance Company, 73 Fed. (2d) 681 (C. C. A. 10) 2, 12

Smyth vs. Ames, 169 U. S. 466, 516, 18 S. Ct. 418, 422 .....2, 5, 8, 15, 33, 44

Sovereign Camp, W. O. W., vs. O'Neill, 266 U. S. 292, 295, 45 S. Ct. 49, 50 .....4, 21

Standard Oil Company of New Mexico vs. Standard Oil Company of California, 56 Fed. (2d) 973, 976 (C. C. A. 10) 8, 41

State of Alabama vs. State of Arizona, 291 U. S. 286, 290, 54 S. Ct. 399, 401 15

State of Kansas vs. State of Colorado, 185 U. S. 125, 145, 22 S. Ct. 552, 559 .....2, 7, 40

Stifel's Union Brewing Co. vs. Saxy, 273 Mo. 159, 201 S. W. 67 54

Swift & Co. vs. United States, 276 U. S. 311, 326, 48 S. Ct. 311, 315 .....7, 41

Terrace vs. Thompson, 263 U. S. 197, 214, 44 S. Ct. 15, 17 .....3, 19

Tyler vs. Savage, 143 U. S. 79, 95, 12 S. Ct. 340, 345 2, 13

Union Pac. Ry. Co. vs. Chicago, R. I. & P. Ry. Co., 163 U. S. 564, 600, 16 S. Ct. 1173, 1187 .....2, 14

Vicksburg Water Works Company vs. Vicksburg, 185 U. S. 65, 82, 22 S. Ct. 585, 592 .....8, 41

Watson vs. Sutherland, 5 Wall. 74, 18 L. Ed. 580, 582 2, 14

Wells Fargo and Company vs. Taylor, 254 U. S. 175, 183, 41 S. Ct. 93, 96 .....7, 38

Wetmore vs. Rymer, 18 S. Ct. 295, 169 U. S. 115, 128 10

Wright vs. Insurance Company, 19 Fed. (2d) 117 (C. C. A. 5) 276 U. S. 602 .....7, 36

STATUTES

Federal Equity Rule 26 ..... 4, 28
36 Statute 1163, 28 U. S. C. A., Section 384 38
36 Statute 1162, 28 U. S. C. A., Section 379 .....
..... 7, 10, 40, 50, 53
36 Statute 1163 (Judicial Code, Section 267) 7, 8, 45
Section 765, R. S. Mo., 1929 ..... 52, 29, 42

TEXT BOOKS

21 C. J., Section 50, page 77 50

Supreme Court of the United States

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No. 28.

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VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

RESPONDENT'S REPLY BRIEF.

I.

STATEMENT.

Petitioners' statement is complete and we make no objection thereto. However, we respectfully suggest that the opinion of the circuit court of appeals presents a somewhat clearer and more concise statement of the facts (Tr. pp. 12 to 14) also 75 Fed. (2d) 808.

BRIEF SUMMARY OF ARGUMENT.

POINT I.

The Primary Object Sought in Respondent's Bill Is Cancellation of These Two Policies of Insurance. This Is a Matter of Original Equity Jurisdiction and Can Be Defeated Only by Showing That There Is an Adequate Remedy at Law.

Cancellation is a remedy available only in equity. There being stated in the bill a cause of action for cancellation, this case comes within the equity jurisdiction of the court. *New York Life Insurance Company* v. *Miller,* (C. C. A. 8) 73 Fed. (2d) 350; *Shane* v. *West Coast Life Insurance Company,* 73 Fed. (2d) 681, 683 (C. C. A. 10); *Louisville N., A. & C. Ry. Co.* v. *Louisville Trust Company,* 174 U. S. 552, 567, 19 S. Ct. 817, 822; *Rich* v. *Braxton,* 158 U. S. 375, 405, 15 S. Ct. 1006, 1017; *Allore* v. *Jewell,* 94 U. S. 506, 511, 24 L. Ed. 260, 264; *Tyler* v. *Savage,* 143 U. S. 79, 95, 12 S. Ct. 340, 345; *Union Pac. Ry. Company* v. *Chicago, R. I. & P. Ry. Co.,* 163 U. S. 564, 600, 16 S. Ct. 1173, 1187; *Watson* v. *Sutherland,* 5 Wall. 74, 18 L. Ed. 580, 582; *Oelrichs* v. *Williams,* 15 Wall. 211, 228, 21 L. Ed. 43, 44; *State of Alabama* v. *State of Arizona,* 291 U. S. 286, 54 S. Ct. 399, 401; *Smyth* v. *Ames,* 169 U. S. 466, 516, 18 S. Ct. 418, 422.

POINT II.

Unless Relief Is Granted Here in Equity, Two Suits at Law Will Be Required to Settle the Issues. It Will Be Less Expensive and More Convenient to Both Parties to Try the Issues of Plaintiffs' Bill in One Action in the Federal Court.

Since petitioner, Mary Di Giovanni, is interested only in the policy on the real property, the two policies could

not be legally combined in one suit in the state court. Section 865, R. S. Mo., 1929. The balance of convenience is in favor of one action in the federal court. That is the final test of equity jurisdiction; *Hale* v. *Allison*, 118 U. S. 56, 72, 77, 23 S. Ct. 244, 250, 252; *First State Bank* v. *Chicago, R. I. & P. Ry. Co.*, 63 Fed. (2d) 585, 590, 591 (C. C. A. 8); *Terrace* v. *Thompson*, 263 U. S. 197, 214, 44 S. Ct. 15, 17.

POINT III.

Respondent Properly Joined the Policy for $3,000.00 and the Policy for $1,500.00 in One Bill in Equity. The Jurisdictional Amount Was, Therefore, Involved.

(A) RESPONDENT'S BILL CHARGES A CONSPIRACY. THIS CONSTITUTES AN EXCEPTION TO THE GENERAL RULE. IT ENTITLES RESPONDENT TO HAVE THE SUMS OF THE TWO POLICIES AGGREGATED FOR THE PURPOSE OF DETERMINING JURISDICTION.

The bill alleges these two policies were procured by petitioners at the same time; that these policies were procured at the time when petitioners also procured four other policies on the building and one other policy on the contents; that all of said policies were procured as a part of a general scheme and plan to overinsure the property, burn it, and collect from the insurance companies; that pursuant thereto, petitioners did burn the property, file proofs of loss claiming a total loss and are demanding the full face of the policies and threatening to sue in the state court unless the insurance companies pay in full. By means of this conspiracy petitioners have tied these claims together so that they should be aggregated in determining the

jurisdictional amount. *Sovereign Camp, W. O. W.*, v. *O'Neill*, 266 U. S. 292, 295, 45 S. Ct. 49, l. c. 50; *McDaniel* v. *Traylor*, 196 U. S. 415, 427, 25 S. Ct. 369, 373; *McDaniel* v. *Traylor*, 212 U. S. 428, 432, 29 S. Ct. 343, 345.

(B) RESPONDENT HAD THE RIGHT TO MAINTAIN ONE ACTION IN EQUITY IN THE FEDERAL COURT FOR CANCELLATION OF BOTH POLICIES. THERE WAS, THEREFORE, INVOLVED THE AGGREGATE OF THESE TWO POLICIES OR $4,500.00 AND MORE THAN THE REQUISITE JURISDICTIONAL AMOUNT.

Both policies are alleged to have been procured at the same time and as a part of the same conspiracy to defraud. The alleged damage under each policy occurred at the same time and in the same fire. Petitioner, Pete Di Giovanni, is interested in both policies. Most of the issues are the same as to both policies. Both policies were, therefore, properly joined in one bill for cancellation and the aggregate amount brings the case within the jurisdiction of the federal court. *Providers' Mutual Life Insurance Company of Philadelphia* v. *Parsons*, 70 Fed. (2d) 863, 864, certiorari denied by this court 55 S. Ct. 95; *New York Life Insurance Company* v. *Jones*, 2 Fed. Supp. 600 (D. C. N. E. D. N. C.); Equity Rule 26 (28 U. S. C. A., Section 723); *Kimel* v. *Missouri State Life Insurance Company*, 71 Fed. (2d) 921, 924 (C. C. A. 10); *Baltimore and Ohio Southwestern Railway Company* v. *United States*, 220 U. S. 94, 106, 31 S. Ct. 368, 371; *Metropolitan Life Insurance Company* v. *Dunne*, 2 Fed. Supp. 165, 166 (D. C. S. D. New York); *City of Dothan, Alabama*, v. *First National Bank of Dothan*, 61 Fed. (2d) 685 (C. C. A. 5); *Geneva Furniture Company* v. *S. Karpen & Bros.*, 238 U. S. 254, 35 S. Ct. 788.

POINT IV.

Respondent Has No Remedy on the Law Side of the Federal Court Which Is the Test As to Whether There Is an Adequate Remedy at Law Preventing the Exercise of Equitable Jurisdiction by a Federal Court.

The case being one of original equity ~~of~~ jurisdiction, the requisite jurisdictional amount being involved (Point III a, b) equity jurisdiction can be defeated only by there being a clear and adequate remedy at law.

Both policies cannot legally be joined in one action in the state court since petitioner, Mary Di Giovanni, is not interested in the policy on the personal property and the state statutes provide actions may be joined only where all the parties are interested in all the causes of action joined. Section 765, R. S. Mo., 1929.

Since separate actions would have to be filed in the state court the jurisdictional amount would not be involved therein to permit removal to the Federal District Court. There is, therefore, no possible remedy on the law side of the federal court which is the test of whether there is an adequate remedy at law. *Leavenworth Savings and Trust Co.* v. *Newman*, 23 Fed. (2d) 835 (C. C. A. 8); *Fish* v. *Kennamer*, 37 Fed. (2d) 243, 247 (C. C. A. 10); *Brown* v. *Guarantee Trust and Safe-Deposit Company*, 128 U. S. 403, 412, 9 S. Ct. 127, 130; *Davis* v. *Wakelee*, 156 U. S. 680, 688, 15 S. Ct. 555, 558; *Barber* v. *Barber*, 21 How. 591, 16 L. Ed. 226, 229; *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, 272; *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 422; *Risty* v. *Chicago, R. I. & P. R. R. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240; *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, 261.

SERIATIM ANSWER TO PETITIONERS' POINTS.

(Following Order in Petitioners' Brief.)

POINT A.

The Circuit Court of Appeals Properly Overruled Petitioners' Motion to Complete the Record.

This motion was not filed until after the opinion was handed down by the circuit court of appeals and was raised only in connection with petitioners' motion for rehearing. We believe it was raised too late. *Burnet* v. *Commonwealth Improvement Company*, 287 U. S. 415, 418, 53 S. Ct. 198, 199; *Lynch* v. *United States*, 292 U. S. 571, 588, 54 S. Ct. 840, 847; *New York Dock Company* v. *Pozman*, 274 U. S. 117, 123, 47 S. Ct. 482, 485.

POINT B.

The Circuit Court of Appeals Properly Held That Complainant Could Maintain Its Bill in Equity Because It Had No Adequate Remedy at Law in the Federal Court.

(a)

There is no danger of all installment policies aggregating a total in excess of $3,000.00 being drawn into the federal court by this decision. Contingent future installments may not be aggregated. *Wright* v. *Insurance Company*, 19 Fed. (2d) 117, (C. C. A. 5) 276 U. S. 602; *Healy* v. *Ratta*, 292 U. S. 263, 271, 54 S. Ct. 700, 704.

The injunction here sought is not to restrain actions already pending in the state court but to protect the jurisdiction of the federal equity court properly in-

voked by respondent. In such situation the federal courts never hesitate to issue the injunction for the protection of their own jurisdiction. *Julian* v. *Central Trust Company*, 193 U. S. 93, 112, 24 S. Ct. 399, 407; *Wells Fargo and Company* v. *Taylor*, 254 U. S. 175, 183, 41 S. Ct. 93, 96; *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 218, 38 S. Ct. 460, 462.

The circuit court of appeals' opinion herein does not interfere with petitioner's right of a trial by a jury. Before the adoption of the Federal Constitution there was no right of a trial by jury in an equitable action for cancellation. Here, if cancellation is not decreed, petitioners will have a right to a jury trial on the law issues. *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 242, 43 S. Ct. 118, 121; *American Mills Company* v. *American Surety Company*, 260 U. S. 360, 364, 43 S. Ct. 149, 151; *Bankers* v. *Ford Motor Company*, 69 Federal (2d) 665 (C. C. A. 3rd.).

(b)

Respondent's bill in equity charges petitioners have filed proofs of loss claiming a total loss and demanding the full face of the policies. It further alleges that petitioners are threatening to sue in the state court to recover on said policies and will do so unless restrained by the federal equity court. The allegations on demurrer stand admitted and are sufficient to show a threatened injury. *State of Kansas* v. *State of Colorado*, 185 U. S. 125, 145, 22 S. Ct. 552, 559; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593, 43 S. Ct. 658, 663; 36 Stat. 1162, 28 U. S. C. A., Section 379; *Swift and Company* v. *United*

States, 276 U. S. 311, 326, 48 S. Ct. 311, 315; *New Mexico* v. *Standard Oil Company*, 56 Fed. (2d) 973, 976 (C. C. A. 10); *Vicksburg Waterworks Company* v. *Vicksburg*, 185 U. S. 65, 82, 22 S. Ct. 585, 592; Section 865, R. S. Mo., 1929.

(c)

These suits could not legally be joined in the state court, each being less than the jurisdictional amount. There could be no removal to the federal court. There is, therefore, no remedy at law on the law side of the federal court which is the test of there being an adequate remedy at law. *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, 261; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240; *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418; *American Mutual Liability Insurance Company* v. *McDonaugh*, 61 Fed. (2d) 558, 563 (C. C. A. 7th) (certiorari denied 288 U. S. 602).

(d)

1 Statute 82 (Section 267, Judicial Code) 36 Statute 1163, provide no suit in equity may be maintained in a federal court where there is an adequate remedy at law refers to adequate remedy at law in the federal court. *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, 272.

Furthermore, two suits at law in the federal courts would not be "as satisfactory, complete, prompt, and efficient to attain the ends of justice as the remedy in equity." *Keaton* v. *Little*, 34 Fed. (2d) 396, 398 (C. C. A. 10); *Dawson* v. *Kentucky Distillers and Warehouse*

Company, 255 U. S. 288, 296, 41 S. Ct. 272, 275; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240.

(e)

There is no reason to classify bills for cancellation within the exception where equity jurisdiction is denied in order to prevent interference with the enforcement of state revenue acts, state judgment, and other internal affairs of state government which involve interference with such state government. There is here involved no interference with state government.

(f)

We have already pointed out that this action is primarily for the cancellation of these policies of insurance. It is not a bill of peace and partakes only slightly of the characteristics of such a bill in that the supplemental relief asked in addition to cancellation involves an injunction against prosecuting claims in the state court.

POINT C.

The Circuit Court of Appeals Properly Held There Was Equitable Jurisdiction for Cancellation Reenforced by the Ability to Avoid a Threatened Multiplicity of Suits.

(a)

We have just pointed out this is primarily a bill for cancellation and not a bill of peace. Furthermore, exceptions have been noted to the requirement that there must be a trial and judgment at law before a bill of peace

can be maintained. This should come within the exception since respondent had to sue before a law action was instituted in the state court or it could never secure an injunction in the federal court restraining proceedings in the state court. 36 Stat. 1162, 28 U. S. C. A., Section 379.

POINT D.

The Bill Alleged the Face Value of the Two Policies Was $3,000.00 and $1,500.00 Respectively. The Bill Alleged Petitioners Were Claiming the Total Loss and Demanding the Full Face Value of the Policies. The Jurisdictional Amount Was, Therefore, Involved.

The bill alleges petitioners are demanding the full face of the policies. These allegations must be accepted as true. *Grand Chute* v. *Winegar*, 15 Wall. (U. S. 373, 376).

The fact on a trial respondent might set up and successfully sustain the defense that it is liable only for one-fifth of the total fire does not make that the amount involved since it does not appear to a "legal certainty" that petitioners may not succeed in recovering the full face of the policies as they seek to do. *Schunk* v. *Moline, Milburn & Stoddard Company*, 147 U. S. 500, 504, 13 S. Ct. 416; *Barry* v. *Edmunds*, 6 S. Ct. 501, 116 U. S. 550, 559.

Furthermore, the burden is on the defendant to prove less than the jurisdictional amount is involved. *Heally* v. *Ratta*, 293 U. S. 263, 271, 54 S. Ct. 700, 704; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 333 S. Ct. 529, 532; *Wetmore* v. *Rymer*, 18 S. Ct. 295, 169 U. S. 115, 128; *Put-in-Bay W. L. R. Company* v. *Ryan*, 181 U.

S. 409, 431, 21 S. Ct. 709, 717; *Beacher* v. *Pan American Life Insurance Company*, 73 Fed. (2d) 263, 264 (C. C. A. 5th).

POINT E.

The Circuit Court of Appeals Properly Held the Two Claims Arising under the Two Policies of Insurance Could Be Tied Together for the Purpose of Ascertaining the Amount Involved for Jurisdictional Purposes.

(a and b)

The issues under this heading have been discussed by us under Point III, a and b, to which we refer this court.

ARGUMENT.

POINT I.

The Primary Object Sought in Respondent's Bill Is the Cancellation of These Two Policies of Insurance. This Is a Matter of Original Equity Jurisdiction and Can Be Defeated Only By Showing That There Is an Adequate Remedy At Law.

In the opinion of the circuit court of appeals herein (Tr. p. 16) the court cites the case of *New York Life Insurance Company* v. *Miller*, (C. C. A. 8) 73 Fed. (2d) 350, as sustaining the proposition that "the right to maintain an equitable action to rescind or cancel a contract of insurance, because of false representation made by the insured to induce its execution, where there is no adequate remedy at law, is well recognized. (Citing many cases.)"

In the case of *Shane* v. *West Coast Life Insurance Company*, 73 Fed. (2d) 681, the Circuit Court of Appeals for the 10th Circuit ruled the same way citing numerous authorities at page 683.

In the case of *Louisville, N. A. & C. Ry. Co.* v. *Louisville Trust Company*, 174 U. S. 552, 567, 19 S. Ct. 817, this court said, l. c. 822:

> "The demurrers to the bill for want of equity were rightly overruled, and were not insisted on in this court. The object of the bill was that the guaranty upon a great number of negotiable bonds, which might otherwise pass into the hands of *bona*

fide purchasers, might be cancelled, and suits upon the guaranty restrained, because of facts not appearing upon its face. The relief sought could only be had in a court of equity. *Peirsoll* v. *Elliott*, 6 Pet. 95, 98; *Grand Chute* v. *Winegar*, 15 Wall. 373, 376; *Robb* v. *Vos*, 155 U. S. 13, 15 Sup. Ct. 4; *Springport* v. *Bank*, 75 N. Y. 397; *Fuller* v. *Percival*, 126 Mass. 381."

To the same effect see *Rich* v. *Braxton*, 158 U. S. 375, 405, 15 S. Ct. 1006, l. c. 1017.

In the case of *Allore* v. *Jewell*, 94 U. S. 506, 511, 24 L. Ed. 260, this court said, l. c. 264:

> "'If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case, is among its best settled principles.' *Harding* v. *Handy*, 11 Wheat. 125."

Further, the petition reveals other grounds of equitable jurisdiction, to-wit: fraud, injunction and avoidance of a multiplicity of suits. These elements are fundamental grounds for equitable relief. In the case of *Tyler* v. *Savage*, 143 U. S. 79, 95, 12 S. Ct. 340, this court in holding equity had jurisdiction where similar equitable relief was asked, said, l. c. 345:

> "Thus there were in the case, as ingredients to support the jurisdiction of equity, discovery, account, fraud, misrepresentation, and concealment. Story, Eq. Jur., Sections 64k, 67, 184, 191, *Jones* v. *Bolles*, 9 Wall. 364, 369."

To obtain justice and do equity, this court has persistently refused to permit equitable remedies to become circumscribed and limited. The rule is well stated by this court in the case of *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 600, 16 S. Ct. 1173, as follows, l. c. 1187:

> "It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said equity has contrived its remedies 'so that they shall correspond both to the primary right of the insured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, or to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.' Pom., Eq. Jur., Section 111."

In the case of *Watson* v. *Sutherland*, 5 Wall. 74, 18 L. Ed. 580, this court in upholding the issuance of an injunction to prevent the levies of execution on a number of judgments on property of an innocent third person said, l. c. 582:

> "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character, as disclosed in the pleadings."

The primary object of respondent's bill in equity is to obtain cancellation of these two policies of insurance.

Such a decree would not only destroy the policies themselves as evidence, but would also establish their invalidity so that no future action could be maintained upon claimed contracts of insurance arising out of the transactions here in issue. Aside from the other equitable grounds of relief which we have mentioned, cancellation alone is sufficient to establish the jurisdiction of the federal equity court. We believe this case comes squarely within the law as declared by this court in the case of *Oelrichs* v. *Williams*, 15 Wall. 211, 228, 21 L. Ed. 43, where this court said, l. c. 44:

> "The direct proceeding in equity will save time, expense and a multitude of suits, and settle the rights of all concerned in one litigation. Besides, there is an element of trust in the case, which, wherever it exists always confers jurisdiction in equity."

In the case of *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, this court said, l. c. 422:

> "But if the case, in its essence, be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction. *Payne* v. *Hook*, 7 Wall. 425, 430; *McConihay* v. *Wright*, 121 U. S. 201, 205, 7 S. Ct. 940."

In the case of *State of Alabama* v. *State of Arizona*, 291 U. S. 286, 290, 54 S. Ct. 399, this court said, l. c. 401:

> "There is no test or rule of general application by which to determine whether a complaint in equity is multifarious. That question is to be de-

cided by the court in the exercise of sound discretion having regard to the facts alleged, circumstances disclosed, and the character of the relief sought. *Oliver* v. *Pratt*, 2 How. 333, 411, 11 L. Ed. 622; *Nelson* v. *Hill*, 5 How. 127, 132, 12 L. Ed. 81; *Shields* v. *Thomas*, 18 How. 253, 259, 15 L. Ed. 368; *Fitch* v. *Creighton*, 24 How. 159, 163, 164, 16 L. Ed. 596; *Brown* v. *Guarantee Trust & Safe-Deposit Co.*, 128 U. S. 403, 410, 9 S. Ct. 127, 32 L. Ed. 468."

Under the above authorities it seems clear to us that the allegations of respondent's bill bring this case squarely within the original equity jurisdiction of the federal court. The jurisdictional amount is involved and there is no adequate remedy at law, as we will point out hereinafter. (Points III and IV.)

POINT II.

Unless Relief Is Granted Here in Equity Two Suits at Law Will Be Required to Settle the Issues. It Will Be Less Expensive and More Convenient to Both Parties to Try the Issues of Plaintiff's Bill in One Action in the Federal Court.

In the case at bar it appears unless this court holds there is federal jurisdiction of this bill in equity the respondent will be vexed by two separate suits in the state court on these policies of insurance. These two policies were taken out at the same time and under the same circumstances rendering the main issues in the two separate suits identical; the suit in equity will, therefore, avoid a multiplicity of suits. We have already pointed out that the nature of the allegations in respondent's bill and the relief asked bring it within the original equity jurisdiction of the court. It is more economical, con-

venient, prompt and effective to try this matter in one suit in the United States District Court in the city where the policy was taken out and the fire occurred and where the witnesses live than to try two different suits in jurisdictions chosen by petitioners which may be away from the vicinity of the fire and the residences of the witnesses. Petitioners will be subjected to trying the equitable issues first even in the state court. The two cases would no doubt be tried so close together that the first would not become *res adjudicata* before the second one was tried.

In the case of *Hale* v. *Allinson*, 188 U. S. 56, 23 Sup. Ct. Rep. 244, the court in laying down the test as to when jurisdiction in equity should be exercised, declared the law as follows, l. c. 250 (188 U. S. l. c. 72):

> "In any case where the facts bring it within the possible jurisdiction of the court, according to the view taken by it in regard to such facts, the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness, and the inadequacy of the remedy at law."

l. c. 252 (188 U. S. l. c. 77):

> "Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the

adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."

In the case of *First State Bank* v. *Chicago, R. I. & P. Ry. Co.*, 63 Fed. (2d) 585 (C. C. A. 8th) the court said, l. c. 590:

"The avoidance of unnecessary suits should be much desired by litigants and taxpayers. In *Munson Inland Lines, Inc.*, v. *Insurance Co. of North America*, (D. C. N. Y.) 38 Fed. (2d) 269, 271, Judge Woolsey clearly expresses such desire, 'that the avoidance of multiplicity of suits by every device, which is jurisdictionally possible and practically convenient, should be encouraged, and should be one of the main objectives of procedural administration, and of decisions by courts in practice cases.' And the same judge in *Irving Trust Co.* v. *Marine Midland Trust Co. of New York*, (D. C. N. Y.) 47 Fed. (2d) 907, 908, states that 'multiplicity of suits involving issues which can be conveniently tried together, is something that equity holds in abhorrence."

l. c. 591:

"Surely a suit could be brought in equity under these circumstances to cancel void instruments so that in this case there is a well-recognized ground of equity jurisdiction outside of multiplicity of suits. The relief sought against all the defendants was the same, to-wit, the cancellation of these bills of lading.

> The defenses which could be interposed were the same, the legal questions were the same. The operation of the acts of defendants upon plaintiff were identical in their effect upon plaintiff's rights."

In the case of *City of Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1, 19 S. Ct. Rep. 77, the court had before it an action to restrict the city from violating its covenant not to erect a competing waterworks, to the plaintiff. A demurrer to the bill was filed below and overruled. In affirming such action by holding the case cognizable in equity, this court said, l. c. 82 (172 U. S. l. c. 12):

> "This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt admission, as the remedy in equity. *Boyce* v. *Grundy*, 3 Pet. 210, 215; *Ins. Co.* v. *Bailey*, 13 Wall. 616, 621; *Kilbourne* v. *Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594; *Tyler* v. *Savage*, 143 U. S. 79, 95, 12 Sup. Ct. 340."

It is our contention that the legal remedy in a state court—there being no legal remedy in the federal court—is not an adequate legal remedy within the decisions of this court aside from the fact that the legal remedy to defeat federal equity jurisdiction must be a legal remedy on the law side of the federal court. We submit the situation here does not measure up to the test set by this court in the case of *Terrace* v. *Thompson*, 263 U. S. 197, 214, 44 S. Ct. 15, where this court said, l. c. 17:

> "But the legal remedy must be as complete, practical and efficient as that which equity could

afford. *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 281, 29 Sup. Ct. 426, 53 L. Ed. 796; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 11, 12, 19 Sup. Ct. 77, 43 L. Ed. 341."

POINT III.

Respondent Properly Joined the Policy for $3,000.00 and the Policy for $1,500.00 in One Bill in Equity. The Jurisdictional Amount Was Therefore Involved.

(A) RESPONDENT'S BILL CHARGES A CONSPIRACY. THIS CONSTITUTES AN EXCEPTION TO THE GENERAL RULE AND ENTITLES RESPONDENT TO HAVE THE SUMS OF THE TWO POLICIES AGGREGATED FOR THE PURPOSE OF DETERMINING JURISDICTION.

We direct attention to the allegations of the petition on pages 3 and 4 of the transcript wherein respondent charges that these and certain other policies issued by other companies were procured by petitioners as a part of a general scheme and plan to defraud insurance companies by over-insuring the property and setting the same on fire. It is charged that the policies were procured from respondent under the representation no other insurance would be taken on the property. (Tr. p. 3.) It further charges, that petitioners set fire to this property; that petitioners have filed proofs of loss claiming a total loss of the property and demanding the full face of these policies. It is further charged that unless relief is granted in this action, petitioners will file two suits at law in the state court, "as a means of consummating the said fraudulent purpose, scheme, and plan of the said respondents * * *" (Tr. p. 4.)" These allegations clearly charge conspiracy on the part of the defendants. The circuit court of appeals so held (Tr. p. 15) and petitioners

do not here claim otherwise. By means of this conspiracy, the petitioners have tied these claims together so that respondent is entitled to have the sums of the two policies aggregated for the purpose of determining the issue of jurisdiction. Where there is a charge of conspiracy, as here, the case falls within a well-recognized exception to the general rule that different contracts may not ordinarily be aggregated in determining jurisdiction.

In the case of *Sovereign Camp, W. O. W.*, v. *O'Neill*, 266 U. S. 292, 45 S. Ct. Rep. 49, the situation was very similar to the one at bar. A suit was brought in equity by the sovereign camp against twenty-five of its members, charging them with entering into a conspiracy to have themselves elected delegates to a session of the Sovereign Camp, where it was decided they had not been legally elected and were not entitled to sit as delegates. It was further alleged that, pursuant to said agreement, these twenty-five defendants had instituted twenty-five different suits in a local court of Texas to recover amounts ranging from $987.00 to $1,170.00 as *per diem* and mileage for attendance at the Sovereign Camp. The bill then prayed for an injunction against the prosecution of these suits. Defendants moved to dismiss on the ground the jurisdictional amount was not involved to give jurisdiction based solely on the diversity of citizenship. In denying such motion, this court, speaking through Mr. Justice Sanford, said, l. c. 50 (266 U. S. l. c. 295):

"Exception to this general rule was, however, recognized in *McDaniel* v. *Traylor*, 196 U. S. 415, 427, 25 S. Ct. 369, 49 L. Ed. 533. There the heirs of one Hiram Evans, an intestate, brought suit in

the circuit court against several defendants to enjoin the enforcement of claims that had been allowed as liens upon his real estate by orders of a probate court. Each claim was less than the requisite jurisdictional amount, but their aggregate exceeded that sum. The bill alleged that these claims were not debts of the intestate, but that the defendants had conspired and confederated with the administrator to secure their payment out of the estate, and that the orders allowing them had been procured as the result of the conspiracy and the fraud practiced in pursuance thereof. This court reversed a decree of the circuit court dismissing the bill, on demurrer, for want of jurisdiction, and held that, on the face of the bill, the value of the matter in dispute was 'the aggregate amount of the claims fraudulently procured by the defendants acting in combination to be allowed in the probate court as claims against the estate.' In the opinion, after referring to the class of cases to which *Walter* v. *Northwestern R. Co.* belonged, the court said:

> 'The case before us, however, is presented by the bill in an entirely different aspect. The case may be regarded as exceptional in its facts, and may be disposed of without affecting former decisions. There is no dispute as to the amount of any particular claim. So far as the bill is concerned, if any one of the specified claims is good against the Estate of Hiram Evans, then all are good. • • • The matter in dispute is whether the lands • • • can be sold to pay *all* the claims, *in the aggregate,* which the defendants, by *combination* and *conspiracy,* procured the probate court to allow against the Estate of Hiram Evans. The essence of the suit is the alleged fraudulent combination and conspiracy to fasten upon that estate a liability for debts of John Evans, which were held by the defendants and which they, acting in combination, procured, in co-

operation with James Evans, to be allowed as claims against the Estate of Hiram Evans. By reason of that combination, resulting in the allowance of all those claims in the probate court, as expenses of administering the Estate of Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *One* claim. The validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties, as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action."

And in *McDaniël v. Traylor*, 212 U. S. 428, 433, 29 S. Ct. 343, 344 (53 L. Ed. 584)—on a second appeal—in affirming a decree of the circuit court, made on return of the case, again dismissing the suit for want of jurisdiction, upon a finding that the allegation that the defendants had conspired in procuring the allowance of the claims had not been established, it was said:

'As we have already seen, it was fraudulent combination and conspiracy which united the claims and made the aggregate of the claims the matter in dispute. By reason of that combination, we decided the claims were "so tied" together as to make them "so far as the plaintiffs and the relief sought were concerned, one claim."'

We find that under the allegations of the present bill the case comes fairly within the reason of the exception recognized in the McDaniel cases. It is not only alleged that the defendants' claims are without foundation, but that they originated and are being prosecuted in the state court in pursuance of an agreement and conspiracy to embarrass and

attempt to ruin the society. There is no dispute as to the amount of any particular claim; and the validity of all of them depends upon the same issue. A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy. We conclude, therefore, that, on the face of the bill, the district court had jurisdiction of the suit by reason of the diversity of citizenship and the amount in controversy."

See, also, *McDaniel* v. *Traylor*, 196 U. S. 415, 427, 25 S. Ct. 369, l. c. 373, and the same case on its second appearance in this court 212 U. S. 428, 433, 29 S. Ct. 343, 345.

(B) RESPONDENT HAD THE RIGHT TO MAINTAIN ONE ACTION IN EQUITY IN THE FEDERAL COURT FOR THE CANCELLATION OF BOTH POLICIES. THERE WAS, THEREFORE, INVOLVED THE AGGREGATE OF THESE TWO POLICIES FOR $4,500.00 AND MORE THAN THE REQUISITE JURISDICTIONAL AMOUNT.

Even in the absence of allegations of conspiracy which are here present, we believe respondent had the right to join these two policies in one bill for cancellation in equity. If that is true, then the jurisdictional amount is here involved. In the case of *Providers Mutual Life Insurance Company of Philadelphia* v. *Parsons*, 70 Fed. (2d) 863, the Circuit Court of Appeals for the Fourth Circuit (certiorari denied by this court, 55 S. Ct. 95) said, l. c. 684:

I. JURISDICTION OF THE COURT. This was based solely on diverse citizenship of the parties (28 U. S. C. A., Section 41 (1)) which is limited to cases involving more than $3,000.00 in controversy exclusive of interest and costs. Neither policy was in principal amount for more than $3,000.00, one being for $2,500.00, and the other for $2,000.00; but the two combined exceed the statutory minimum. In our opinion, the requirements of the statute are met in this case. It has been so held in similar situations by several district courts. *New York Life Insurance Co.* v. *Jones*, 2 Fed. Supp. 600 (D. C. W. D. N. C.); *Mutual Life Insurance Company* v. *Rose*, 294 Fed. 122 (D. C. E. D. Ky.), reversed on other grounds (C. C. A.) 19 Fed. (2d) 280; *Metropolitan Life Insurance Company* v. *Dunne*, 2 Fed. Supp. 165 (D. C. E. D. N. Y.). Compare *New York Life Insurance Company* v. *Marshall*, (D. C.) 21 Fed. (2d) 172; *Id.* (C. C. A.) 23 Fed. (2d) 225; *Columbian National Life Insurance Company* v. *Harrison*, 12 Fed. (2d) 986 (C. C. A. 6). The object of the statutory limitation as to amount is intended merely to prevent invoking federal jurisdiction where the amount in controversy is not substantial. While it has been held that separate claims of two or more plaintiffs, each less than the jurisdictional amount, may not be combined to confer jurisdiction (*Lion Bonding and Surety Company* v. *Karatz*, 262 U. S. 77, 86, 43 S. Ct. 480, 67 L. Ed. 871), nevertheless, a single plaintiff having several claims, each less than the jurisdictional amount, may properly combine them for the purpose of establishing the requisite amount in controversy where they can properly be joined in one suit or action. Hughes, Fed. Practice, Vol. I, Sections 412, 485; *Yates* v. *Whyel Coke Co.*, 221 Fed. 603, 606 (C. C. A. 6); *Hartford Fire Insurance Company* v. *Erie Railway Company*, (C. C.) 172 Fed. 899; *Massachusetts Protective Ass'n* v. *Kittles*, 2 Fed. (2d) 211 (C. C. A. 5); *Baltimore & O. S. W. R. Co.* v. *United States*, 220 U. S. 94, 31 S. Ct. 368, 55

L. Ed. 384. There is no objection to joining in one equity suit both policies for purposes of cancellation, as this is entirely permissible under Equity Rule 26 (28 U. S. C. C. A., Section 723)."

In the case of *New York Life Insurance Company* v. *Jones*, 2 Fed. Supp. 600, the District Court for the Northeastern District of North Carolina said, l. c. 600:

"Equity Rule 26 (28 U. S. C. A., Section 723) provides: 'The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant.'

28 U. S. C. A., Section 41 (1), confers jurisdiction on the United States District Court where there is diversity of citizenship if the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00. This provision applies to actions at law and suits in equity. Cyc. of Fed. Pro., Section 56; *Farmers' & Merchants' Bank of Richmond*, (D. C. N. C.) 274 Fed. 235. The authorities hold that the amount in dispute is the sum of the claims in all the counts upon causes of action properly joined. *Stanley* v. *Board of Supervisors of Albany County*, (C. C. N. Y.) 15 Fed. 483, affirmed 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000; *Hartford Fire Insurance Company* v. *Erie*, (C. C.) 172 Fed. 899.

In *B. & O. Southwestern Railroad Company* v. *United States*, 220 U. S. 94, 31 S. Ct. 368, 55 L. Ed. 384, eleven actions at law were instituted to recover penalties, but the cases were consolidated by the trial court. Jurisdiction was challenged because the amount involved in each case was only $1,000.00, when consolidated the amount was $5,500.00, and the court held it had jurisdiction. *Heffner* v. *Gwynne-*

Treadwell Cotton Co., (C. C. A.) 160 Fed. 635; *Schunk* v. *Moline, Milburn & Stoddard Co.*, 147 U. S. 500, 13 S. Ct. 416, 37 L. Ed. 255; *Yates* v. *Whyel Coke Co.*, (C. C. A. 6th) 221 Fed. 603; *Edwards* v. *Bates County*, 163 U. S. 269, 16 S. Ct. 967, 41 L. Ed. 155."

In the case of *Kimel* v. *Missouri State Life Insurance Company*, 71 Fed. (2d) 921, the United States Circuit Court of Appeals for the Tenth Circuit in a law action said, l. c. 924:

> "Where the plaintiff has several demands against the defendant which he may join in one action, the aggregate of those demands exclusive of interests and costs is the amount in controversy."

In the case of *Baltimore & Ohio Southwestern Railroad Company* v. *United States*, 220 U. S. 94, 106, 31 S. Ct. 368, this court said, l. c. 371:

> "The point is made in the brief that this court has no jurisdiction, because the amount involved in the cases embraced in these writs of error was only $1,000.00. The court, whether properly, consolidated all the cases (Rev. Stat., Section 921, U. S. Comp. Stat., 1901, p. 685) and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars."

See, also, *Metropolitan Life Insurance Company* v. *Dunne*, 2 Fed. Supp. 165, 166 (D. C. S. D. New York).

We have found only two cases which at first blush seem to hold contrary to the above. In the case of *City of Dothan, Ala.*, v. *First National Bank of Dothan*, 61

Fed. (2d) 685, the Circuit Court of Appeals for the 5th Circuit held that the second equitable action, involving only a thousand dollars, could not be joined to another action already pending in a federal equity court because it was a separate action and did not involve the jurisdictional amount. We believe that decision is based on the fact the two actions were unrelated and, therefore, not properly joined. The court decided the second action, l. c. 686, as "a liability wholly different from that asserted against the original defendant," and l. c. 687, "The separate and distinct equitable cause of action asserted by the amendment, etc."

The other case to which we refer is the decision of this court in the case of *Geneva Furniture Manufacturing Company* v. *S. Karpen & Bros.*, 238 U. S. 254, 35 S. Ct. 788, where this court held that part of the suit was brought under the patent law and therefore properly in the federal court. The court then held that the remainder of the action did not arise under the patent law. The court held simply that the court could not take jurisdiction of the second suit against the defendant without its consent save in a district of its residence or that of a plaintiff. (Jud. Code, Section 51.) There is no such issue here and since the cancellation of both policies and an injunction against suits thereon in the state court are matters of original equity jurisdiction which may properly be joined under Equity Rule 26, we submit, aside from the allegation of conspiracy, the jurisdictional amount is here involved.

POINT IV.

Respondent Has No Remedy on the Law Side of the Federal Court Which Is the Test of Whether There Is an Adequate Remedy at Law Preventing the Exercise of Equity Jurisdiction by a Federal Court.

In the case at bar, actions at law on these two policies could not be joined in one suit. The statutes of Missouri provide. All parties must be interested in all causes of action joined at law. Sec. 865, R. S. Mo., 1929 (set out in full under Point C (b) *infra*).

Here petitioner, Mary Di Giovanni, has no interest in any recovery under the policy insuring the personal property. Under the Missouri statutes actions may be joined only where all parties are interested in all the actions so joined. Since that situation does not here exist, two suits would necessarily have to be brought in the state court, neither of which would be removable to the federal court. There is a common point of litigation in the two suits since the issues in both are identical except as to the measure of damages and the issue of whether petitioner, Mary Di Giovanni, participated in the fraudulent conspiracy and thereby is debarred of recovery. Although these actions cannot be joined at law they can be joined in equity in this court.

In the case of *Leavenworth Savings and Trust Company* v. *Newman*, 23 Fed. (2d) 835, the Circuit Court of Appeals for the Eighth Circuit had before it an appeal from the District Court for the Western District of Missouri. Suit had been instituted in equity against stockholders of the mortgagor company on guaranty agreements

with a prayer for an accounting and for the determination of liability of each of the defendants. This court dismissed the bill. In reversing the court with instructions to reinstate the bill, the United States Circuit Court of Appeals held each guaranty agreement was part of the same transaction and the matter was properly brought in equity. In so holding, the court said, l. c. 838:

> "In the case at bar, some of the numerous questions involved are of equitable cognizance; many of them are common to all of the defendants. Each defendant is further interested in the amount recovered from each of the codefendants. The remedy at law available to plaintiff is not as prompt, practical and efficient to attain the ends of justice as a suit in equity. On the face of the bill, at least, the convenience of both plaintiff and defendants will be best subserved by a single suit in equity. Under such circumstances the avoidance of a multiplicity of suits is a sufficient and valid reason for joining the defendants in a single equitable suit. *Hayden* v. *Thompson*, 71 Fed. 60 (C. C. A. 8); *Wyman* v. *Bowman*, 127 Fed. 257 (C. C. A. 8); *Lake Charles Rice Milling Co.* v. *Pacific Rice Growers' Ass'n*, (C. C. A.) 295 Fed. 246."

In the case of *Fish* v. *Kennamer*, 37 Fed. (2d) 243, the United States Circuit Court of Appeals for the 10th Circuit in an ejectment action where numerous claimants were permitted to intervene, said l. c. 247:

> "It has been held, by the Supreme Court of the United States, to be impracticable to lay down any fixed, unbending rule as to what constitutes multifariousness or misjoinder of causes of action. *Oliver* v. *Peath*, 3 How. 411 (11 L. Ed. 622); *Gaines* v. *Chew*, 2 How. 619 (11 L. Ed. 402); *Barney* v. *Latham* (103 U. S. 205, 26 Ed. 514), October Term, 1880-1 • • •."

In the case of *Brown* v. *Guarantee Trust & Safe-Deposit Company*, 128 U. S. 403, 412, 9 S. Ct. 127, this court said, l. c. 130:

> "The case against one defendant may be so entire as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case, the objection of multifariousness cannot be allowed to prevail. *Attorney-General* v. *Poole*, 4 Mylne & C. 17, 31; *Turner* v. *Robinson*, 1 Sim. & S. 313; *Attorney-General* v. *Cradock*, 3 Mylne & C. 85. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. *Addison* v. *Walker*, 4 Younge & C. 442; *Parr* v. *Attorney-General*, 8 Clark & F. 435; *Worthy* v. *Johnson*, 8 Ga. 238."

In the state law court respondent would have to establish the participation of petitioner, Mary di Giovanni, as well as Pete di Giovanni in order to maintain its defense.

The remedy in a state court is, therefore, wholly inadequate within the ruling of this court in the case of *Davis* v. *Wakelee*, 156 U. S. 680, 688, 15 S. Ct. 555, where this court said, l. c. 558:

> "In the uncertainty which appears to exist in that state as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful,

a court of equity will not decline cognizance of the suit. *Boyce's Ex'rs* v. *Grundy*, 3 Pet. 210; *Watson* v. *Sutherland*, 5 Wall. 74, 79; *Rathbone* v. *Warren*, 10 Johns. 587; *King* v. *Baldwin*, 17 Johns. 384; *Insurance Co.* v. *Fisk*, 1 Paige 90; *Teague* v. *Russell*, 2 Stew. (Ala.) 420; *Southhampton Dock Co.* v. *Southhampton Harbour & Pier Board*, L. R. 11, Eq. 254; *Weymouth* v. *Boyer*, 1 Ves. Jr. 416. Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

There is no possible way for respondent to get into the law side of the federal court. There is, therefore, no legal remedy on the law side of the federal court which is the test of an adequate remedy at law defeating federal equity jurisdiction. In the case of *Barber* v. *Barber*, 21 Howard 591, 16 L. Ed. 226, this court said, l. c. 229:

"'There is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local law. For the equity jurisdiction of the federal courts is the same in all of the states, and is not affected by the existence or nonexistence of an equity jurisdiction in the state tribunals.'"

In the case of *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, this court in an opinion by Mr. Chief Justice Hughes, refused to exercise equitable jurisdiction in a case brought under a state statute of a remedial character attempting to enlarge the equity jurisdiction of the federal court. In so ruling, however, the court said, l. c. 272:

"The act of Congress with respect to the existence of such a remedy has reference to the ade-

quacy of the remedy on the law side of the federal courts (*Smyth* v. *Ames,* 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. Railway Company* v. *Osborne,* 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & P. Ry. Company,* 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641) * * *"

In the case of *Smyth* v. *Ames,* 169 U. S. 466, 18 Sup. Ct. Rep. 418, this court, speaking through Mr. Justice Harlan, declared the law as follows, l. c. 422 (169 U. S. l. c. 516):

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court, is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in a federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In the case of *Risty* v. *Chicago, R. I. & P. R. R. Co.,* 270 U. S. 378, 46 Sup. Ct. Rep. 236, this court, speaking through Mr. Justice Stone, declared the law as follows, l. c. 240 (270 U. S. l. c. 388):

> "* * * the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames,* 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne, supra.*"

There are a large number of decisions of the district courts and various circuit courts of appeal declaring the

same principle of law. We state this simply as bearing on the large number of decisions following this court in holding a legal remedy in the state court will not defeat the equity jurisdiction of a federal district court.

In the case of *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, this court said, l. c. 261:

> "As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removability, its existence cannot oust federal equity jurisdiction. *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641, *Mathews* v. *Rodgers, supra*, page 526 of 284 U. S., 52 S. Ct. 217."

SERIATIM ANSWER TO PETITIONERS' POINTS.

(Following Order in Petitioners' Brief.)

POINT A.

The Circuit Court of Appeals Properly Overruled Petitioners' Motion to Complete the Record.

It is now contended that error was committed in denying petitioners the right to have their motion to complete the record sustained and the record completed by adding thereto a provision of the policy insuring the real estate providing that the liability thereof should be proportionate to the total amount of insurance on said real estate.

In the first place, we do not believe petitioners properly preserved this point in the lower courts. They filed no such motion in the district court. They filed no such motion in the United States Circuit Court of Appeals until after an opinion had been handed down against them, when in connection with their motion for rehearing they filed such motion. (Tr. p. 19.) Coming so late it was not the duty of the United States Circuit Court of Appeals to pass on the merits of this motion. Such matters must be timely raised or the point is not entitled to consideration here. In the case of *Burnet* v. *Common Wealth Improvement Company*, 287 U. S. 415, 418, 53 S. Ct. 198, this court said (l. c. 199):

> "The board of tax appeals expressed no opinion concerning the commissioner's method of reckoning—it was not requested so to do. There the respondent relied entirely upon the second point. The circuit court of appeals ruled only on the same point. In such circumstances we do not undertake to determine what was not considered below."

The rule that a point will not be considered by this court on certiorari unless timely and properly raised below is well established. *Lynch* v. *United States*, 292 U. S. 571, 588, 54 S. Ct. 840, l. c. 847; *New York Dock Company* v. *Poznan*, 274 U. S. 117, 123, 47 S. Ct. 482, 485.

POINT B.

The Circuit Court of Appeals Properly Held That Complainant Could Maintain Its Bill in Equity Because It Had No Adequate Remedy at Law in the Federal Court.

(a)

Petitioners erroneously contend that if the circuit court of appeals is right in holding these two policies can

be aggregated, in an action brought thereon in the equity side of the federal court on the ground there is no legal remedy on the law side of that court—separate suits at law in a state court not being removable—that every state court suit for small installments due on policies whose face amount exceeds $3,000.00 would be removable.

Petitioners cite the case of *Wright* v. *Insurance Company,* 19 Fed. (2d) 117 (C. C. A. 5), 276 U. S. 602, as bearing out their contention that if the decision of the circuit court of appeals in this case is permitted to stand all insurance policies may be removed where future installments will amount to over $3,000.00. That case is directly against petitioners' contention. There it is held that the court does not have jurisdiction where the installments due amount to only $420.00 although the liability as to future installments in the aggregate amount to more than $3,000.00.

Further, in the case of *Healy* v. *Ratta,* 292 U. S. 263, 272, 54 S. Ct. 700, l. c. 704, this court held future installments of taxes could not be added to those already due to make up the jurisdictional amount where it was contingent whether the future illegal taxes would be collected. Future installments on insurance policies would always be contingent and could not be added to make up the jurisdictional amount.

Petitioners assert the above rule has no application to actions such as this is. They label this action a bill *quia timet* or bill of peace. They cite no authorities so holding and we have found none which establish

such exception. Furthermore, this is a bill in equity for cancellation and it partakes only slightly of the characteristics of bills of peace or *quia timet.*

Petitioners further urge that to apply this rule to this case would run counter to 36 Stat. 162, 28 U. S. C. A., Section 379, prohibiting federal courts from enjoining proceedings already pending in state courts. As we have pointed out (Point I) this action is for cancellation of two policies of insurance and an injunction against the prosecution of law actions on said policies. The matter comes squarely within the original equity jurisdiction of the United States District Court and the jurisdictional amount is involved. (Points I and III.)

The jurisdiction of the district court to grant the injunction prayed is based on the protection of its own original jurisdiction. This has always been held not to come within the provisions of the statute against injunctions just referred to.

In the case of *Julian* v. *Central Trust Company,* 193 U. S. 93, 112, 24 S. Ct. 399, this court said, l. c. 407:

> "In such cases, where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Section 720, Rev. Stat. (U. S. Comp. Stat., 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon* v. *Terry,* 13 Sawy. 387, 1 L. R. A. 572, 36 Fed. 337, per Mr. Justice Field; *French* v. *Hay,* 22 Wall. 250, 22 L. Ed. 857; *Dietzch* v. *Huide-Roper,* 103 U. S. 494, 26 L. Ed. 497."

In the case of *Wells Fargo and Company* v. *Taylor*, 254 U. S. 175, 183, 41 S. Ct. 93, this court said, l. c. 96:

> "In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States (citing cases) or prevent them from maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts (citing cases) or prevent them from depriving a party by means of an injunction of the benefit of a judgment obtained in a state court in circumstances where its enforcement would be contrary to recognized principles of equity and the standards of good conscience. (Citing cases.)"

To the same effect holding the statute inapplicable where the object is to protect the original jurisdiction of the federal court, see *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 218, 38 S. Ct. 460, l. c. 462.

It is further contended that the ruling of the circuit court of appeals violates 36 Stat. 1163, 28 U. S. C. A., Section 384, which provides for trial by jury. In this, we believe petitioners are again in error. In the case of *Liberty Oil Company* v. *Condon National Bank*, 260 U. S. 235, 242, 43 S. Ct. 118, this court in an opinion by Mr. Chief Justice Taft, after referring to the Seventh Amendment to the Constitution, preserving jury trials in controversies exceeding $20.00, said, l. c. 121:

"Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity and then, if an issue at law remains, it is triable to a jury. *Massie* v. *Stradford*, 17 Ohio St. 596; *Dodsworth* v. *Hopple*, 33 Ohio St. 16, 18; *Taylor* v. *Brick Co.*, 66 Ohio St. 360, 366, 64 N. E. 428; Sutherland, Code Pl. and Pr., Section 1157. The equitable defense makes the issue equitable, and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. The same order is preserved as under the system of separate courts. If a defendant at law had an equitable defense, he resorted to a bill in equity to enjoin the suit at law, until he could make his equitable defense effective by a hearing before the chancellor. The hearing on that bill was before the chancellor, and not before a jury, and if the prayer of the bill was granted, the injunction against the suit at law was made perpetual, and no jury trial ensued. If the injunction was denied, the suit at law proceeded to verdict and judgment. This was the practice in the courts of law and chancery in England when our Constitution and the Seventh Amendment were adopted, and it is in the light of such practice that the Seventh Amendment for it is construed."

To the same effect see *American Mills Company* v. *American Surety Co.*, 260 U. S. 360, 364, 43 S. Ct. 149, 151. *Banker* v. *Ford Motor Company*, 69 Fed. (2d) 665, 665 (U. S. C. C. A. 3rd).

(b)

Petitioners contend complainant's bill in equity fails to show reasonable grounds to apprehend that they will bring two suits at law in the state courts on these two policies and thereby harass and put respondent to ex-

pense. We first direct the court's attention to respondent's petition (Tr. p. 3) where it is alleged that petitioners procured the several policies involved as a part of a general plan and scheme to defraud this insurance company and thereafter, in furtherance of the scheme, petitioners set fire to this property for the purpose of collecting a large sum of money. Following that, the petition alleges:

> "That the said respondents have filed proof of loss against all of said companies, claiming a total loss, although said loss was not total, and that they have threatened to sue complainant upon the two policies issued by complainant as hereinbefore set forth, to recover the face amount of said policies."

These allegations must be taken as true. In the case of *State of Kansas* v. *State of Colorado*, 185 U. S. 125, 145, 22 S. Ct. 552, this court said, l. c. 559:

> "The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer . . . ."

In the case of *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593, 43 S. Ct. 658, 663, this court said:

> "One does not have to await the consummation of tendered injury to obtain preventative relief. If the injury is certainly impending, that is enough."

We direct attention to the fact that under the statute (36 Stat. 1162, 28 U. S. C. A., Section 379) which petitioners cite at page 190 of their brief, the federal court could not enjoin proceedings already pending in the state court on these different policies. Petitioners

want to compel respondent to wait until petitioners bring their suits in the state court and when it is too late under the above statute for respondent to bring an action in equity. As authority for our contention that respondent did not have to wait until such actions were instituted in the state court and there was a legal certainty it would be compelled to defend such actions, we direct attention to the case of *Swift & Co.* v. *United States*, 276 U. S. 311, 326, 48 S. Ct. 311, where the court said, l. c. 315:

> "The argument ignores the fact that a suit for an injunction deals primarily, not with past violations but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated. *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82, 22 S. Ct. 585, 46 L. Ed. 808; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 536, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468."

See, also, *Standard Oil Company of New Mexico* v. *Standard Oil Company of California*, 56 Fed. (2d) 973, 976 (U. S. C. C. A. 10th).

In the case of *Vicksburg Water Works Company* v. *Vicksburg*, 185 U. S. 65, 82, 22 S. Ct. 585, this court said, l. c. 592:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that, therefore, the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and

threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

Here the allegations show petitioners obtained these two policies as part of a general plan and scheme to defraud respondent and other insurance companies; that, thereafter, they caused the property to be set fire in furtherance of such scheme; that, thereafter, they filed proofs of loss with respondent and the other companies claiming a total loss and demanding the full face value of the policies. The bill then alleges that petitioners are threatening to institute actions at law in the state court to recover. As pointed out this allegation should be taken as true here. Furthermore, the facts following this conspiracy show there is danger of such action. To bring the conspiracy to fruition it is necessary for petitioners to collect. This can only be done by a suit since respondent refuses to voluntarily submit to the payment of its policies under the facts here. It cannot be seriously contended that there is no danger of more than one suit being filed because under the Missouri Code the actions on these two policies have to be separately maintained since petitioners are not jointly interested in both causes of action. Under the Missouri Code, actions can be joined only where all parties are interested in each separate cause of action or count there pleaded. (Sec. 865, R. S. Mo., 1929, *supra*.)

What is said with reference to an action for cancellation not being maintainable on matured notes, leases and nonnegotiable instruments refers to the situation where there is an adequate remedy at law. If there is only one instrument involved and one suit threatened, the remedy at law is adequate. Here, however, there must necessarily be two suits at law and the legal remedy is not adequate as shown herein under Point IV.

(c)

Where the requisite amount is involved and the matter comes within the original equity jurisdiction of the Federal District Court the jurisdiction of that court may not be defeated by an action at law in the state court. It may only be defeated by an adequate remedy at law on the law side of the federal court.

The case of *Cable* v. *United States Life Insurance Company*, 191 U. S. 288, and cases of that type are clearly distinguishable. In that case, there existed an adequate remedy at law on the law side of the federal court. The requisite amount was involved on the law side to permit of removal of the cause to the law side of that court.

In the case at bar these two policies for $3,000.00 and $1,500.00, respectively, could not be joined at law by respondent. There was, therefore, no way in which to get respondent's cause of action on the law side of the federal court since there was no adequate remedy on the law side of the federal court and since the matter was within the jurisdiction of the equity side of the federal

court, it follows that respondent was entitled to file its suit directly in the equity side of the federal court. The circuit court of appeals in so holding followed numerous decisions of this and other circuit courts of appeals.

In the case of *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 29, 54 S. Ct. 259, this court said, l. c. 261:

> "If the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removability, its existence cannot oust federal jurisdiction. *Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641; *Mathews* v. *Rodgers, supra*, page 526 of 284 U. S., 52 S. Ct. 217."

In the case of *Risty* v. *Chicago, R. I. & Pac. Ry. Company*, 270 U. S. 378, 388, 46 S. Ct. 236, this court said, l. c. 240:

> "The remedy by appeal to the state court under Section 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedy afforded by the state courts. *Smyth* v. *Ames*, 18 S. Ct. 418, 169 U. S. 466, 42 L. Ed. 819; *Chicago, B. & Q. R. R. Co.* v. *Osborne, supra.*"

See, also, *Smyth* v. *Ames*, 169 U. S. 466, 18 S. Ct. 418, 69 Fed. (2d) 171, 176 (U. S. C. A. 8th) certiorari

denied, 292 U. S. 632, 54 S. Ct. 641. *American Mutual Liability Insurance Company* v. *McDonaugh*, 61 Fed. (2d) 558, 563 (U. S. C. C. A. 7th) (certiorari denied 288 U. S. 602), and numerous decisions of this and other courts cited in the above cases.

Respondents had no adequate remedy at law on the law side of this court. There was no way in which they could get this action into the law side of the federal court. Suit could not be maintained at law on both policies in the state court since not all the parties were interested in both actions. Petitioners had the right and in conformity to the Missouri Code must file two suits at law on these policies, neither of which would involve the jurisdictional amount to permit removal to the law side of the federal court. Since one suit in equity in the federal court could be maintained on both policies as heretofore pointed out it follows the right to maintain such suit cannot be defeated because of any supposed adequate remedy at law in the state court. There is no adequate remedy at law—in fact no remedy at law whatever—on the law side of the federal court. Hence, equity jurisdiction here cannot be defeated on the ground of an adequate remedy at law as shown by the above authorities.

(d)

Petitioners cite 1 Stat. 82 (Section 267 of the Judicial Code) 36 Stat. 1163, which provides that no suit in equity may be maintained in the courts of the United States in any case where "an adequate and complete remedy may be had at law." This section refers to an adequate remedy at law in the federal court. In the case of *Henrietta Mills*

v. *Rutherford County*, 281 U. S. 121, 126, 50 S. Ct. 270, this court in an opinion by Mr. Chief Justice Hughes referring to the section of the judiciary act with reference to adequate remedy at law (281 U. S. 121, 123, 126, 50 S. Ct. 270, 271) said, l. c. 272:

> "The act of Congress with respect to the existence of such a remedy has reference to the adequacy of the remedy on the law side of the federal courts (*Smyth* v. *Ames*, 169 U. S. 466, 516, 18 S. Ct. 418, 42 L. Ed. 819; *Chicago, B. & Q. Railroad Company* v. *Osborne*, 265 U. S. 14, 16, 44 S. Ct. 431, 68 L. Ed. 878; *Risty* v. *Chicago, R. I. & P. Railway Company*, 270 U. S. 378, 388, 46 S. Ct. 236, 70 L. Ed. 641) and in this case there would have been an adequate remedy at law, not only in the state court, but also in the federal court, if petitioners had been able to show a violation of the Federal Constitution. (Judicial Code, Section 24 (28 U. S. C. A., Section 41).)"

Furthermore, if it were material, it seems to us clear enough that any remedy at law would not be "as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity." *Keaton* v. *Little*, 34 Fed. (2d) 396, 398 (U. S. C. C. A. 10th) see, also, *Dawson* v. *Kentucky Distillers and Warehouse Company*, 255 U. S. 288, 296, 41 S. Ct. 272, 275 and *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 388, 46 S. Ct. 236, 240. What is said by counsel for petitioners with reference to nonremovable cases constituting a ground for federal equity jurisdiction is extremely misleading. What this court has held in the many cases cited by us under (c)

supra, is that where the matter is within the original equity jurisdiction of a federal court and in equity the jurisdictional amount is involved, then the federal equity court clearly may take jurisdiction on the ground there is no adequate remedy at law in the federal court. What is said in the opinion of the circuit court of appeals here and in the other cases cited has reference to a situation where the matter is of equitable cognizance and the jurisdictional amount is involved in equity.

The statute does not limit the jurisdiction of the federal district court to cases where the jurisdictional amount is involved both at law and in equity. If the suit is properly in equity as here and the jurisdictional amount is involved in equity, as it is here, then the case may not be thrown back into the state court merely because the jurisdictional amount would not be involved if complainant were attempting to maintain the action at law.

(e)

Petitioners urge that a bill for cancellation of this type should be added to the list of exceptions where this court has declined jurisdiction on the ground there were adequate remedies in the state law courts. An examination of those cases will show this case does not conform to the type of cases grouped under the exceptions. The federal courts are very reluctant to interfere with revenue acts of the state, rate enforcement cases, state judgments, and habeas corpus proceedings, where the state courts do have jurisdiction and have exercised that jurisdiction. In other words, the federal

courts are reluctant to interfere with the operation of state governments. *Bowley* v. *Chicago & N. W. Ry. Co.*, 68 Fed. (2d) 527, 528 (certiorari denied), 54 S. Ct. 716. They are not, however, reluctant to protect their own jurisdictions by injunction or otherwise in cases like the one at bar, which properly comes within the jurisdiction of the federal court. Here the suit in equity in the federal court was filed before any action was taken in the state court. The matter was within the jurisdiction of the federal court and as shown by the authorities (Point I) the federal courts have not hesitated under such circumstances to protect their own jurisdiction by appropriate means. There is no reason to add this case to the group where the parties are relegated to their remedy in the state court as this case has no characteristics in common with the cases placed in such exception.

(f)

This case does properly come within the equitable jurisdiction of the federal court as heretofore pointed out. (Point I.) We here desire to call attention to the inconsistency of petitioners under Point E. Where it best suits their purpose they refer to actions like ours as "bills for cancellation," under this heading they refer to it as a "bill *quia timet.*" It is our contention that this action is a bill for cancellation and not a bill *quia timet* although possibly having some of the characteristics of such latter action. (See Point C(a).)

POINT C.

The Circuit Court of Appeals Properly Held There Was Equitable Jurisdiction for Cancellation Reinforced by the Ability to Avoid a Threatened Multiplicity of Suits.

(a)

Petitioners seek to label this action a bill of peace under this heading and charge that such an action may not be maintained until respondent's rights are first established at law. At page 24 of their brief, the page preceding the one to that where they contend this is a bill of peace, petitioners classify this action as a bill for cancellation and ask this court to catalogue bills for cancellation under the exceptions to federal equitable jurisdictions such as revenue enforcement cases, state court judgments, etc. It is our position that this is essentially a bill for cancellation with the incidental feature of an injunction supplementing the remedy by cancellation.

As pointed out under (c) of Point C of this brief it is apparent that petitioners cannot join both suits at law but will have to maintain two law actions if they seek to recover on both policies.

We contend this is not primarily a bill of peace and that the rule requiring prior adjudication at law does not apply to a case like this where the avoidance of multiplicity of suits is merely incidental and used only to give protection after the court has decreed cancellation.

Furthermore, even where the action is solely a bill of peace and that is the only equity involved, the rule

requiring a prior adjudication has been greatly relaxed. Petitioners cite 21 C. J., Section 50, page 77. It is there stated:

> "But relief has frequently been afforded without awaiting a trial and judgment at law, particularly in the case of repeated *prima facie* trespasses, waste or where a plaintiff's title is admitted or not converted. The rule has been said to be one of expediency and policy rather than an essential condition of equitable jurisdiction."

Here, if respondent had waited until there had been an adjudication at law, it would have lost its right to bring this bill in equity because 36 Statute 1162, 28 U. S. C. A., Section 379, prohibits federal courts from enjoining proceedings already pending in state courts. This situation should certainly come within the exception, even if this were strictly a bill of peace, otherwise, respondent's right to equitable relief would be entirely destroyed.

(b)

Petitioner's contention there can be no multiplicity of suits is entirely fallacious. It is at once apparent that petitioners cannot join the two distinct claims here involved in one suit. Petitioner, Mary Di Giovanni, has no interest in the suit to recover on the policy of insurance on the personal property. Since not all the parties are interested in the subject matter of actions on the two policies they cannot be joined in one suit even under separate counts.

> Sec. 765. Causes of Action That May Be United in the Petition.—The plaintiff may unite in the same petition several causes of action, whether they

be such as have been heretofore denominated legal or equitable or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action; or, second, contract, express or implied; or, third, injuries, with or without force, to person and property, or either; or, fourth, injuries to character; or, fifth, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, sixth, claims to recover personal property, with or without damages, for the withholding thereof; or seventh, claims by or against a party in some representative or fiduciary capacity, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, *and must affect all the parties to the action*, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished. (R. S., 1919, Section 1221.) (Italics ours.)

There must, therefore, be two suits filed, if petitioners seek to recover on both policies. It is suggested that the defendant will have the same control over the cases in the state court as the plaintiff. This is fallacious on its face. The plaintiff has the right to institute these actions in any court having jurisdiction when it chooses and in whatever order it chooses. In the regular course, such actions are tried in the order in which plaintiff chooses to file them and the defendant has no choice in the matter, but is at the mercy of the plaintiff as to when, where and in what order the claims will be litigated.

It was also contended that if the suit on the building policy in which both petitioners are involved were tried first, then the judgment in that suit would be *res adjudicata* against Pete Di Giovanni. This statement is not en-

titled to be taken at face value. In the first place, petitioner could file a motion for a new trial and subsequently take an appeal in that case, thereby suspending said judgment and preventing the same becoming a final judgment. The defense of *res adjudicata* can be sustained only upon proof of a final judgment.

In the case of *Bodkin* v. *Edwards*, 255 U. S. 221, 223, 41 Sup. Ct. Rep. 268, this court said, l. c. 268:

> "Bodkin then took a further appeal to this court, the decision of the circuit court of appeals not being final under Section 128 of the Judicial Code. (Comp. St. 1120.)"

In the case of *Merriam* v. *Saalfield*, 36 Sup. Ct. Rep. 477, 241 U. S. 22, this court declared the law as follows, l. c. 28:

> "But it is familiar law that only a final judgment is *res adjudicata* as between the parties, and it is evident that a decree cannot be *res adjudicata* as against a third party participating in the defense unless it is so far final as to be *res adjudicata* against the defendant himself. Hence, if the decree of September 11th was not final as between appellant and Saalfield, it cannot be *res adjudicata* as against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is found to be this: that, upon the theory that Ogilvie would be estopped from a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles."

As already stated, there is no certainty that the building policy in which both petitioners are interested will be tried first. Petitioners have the sole power of choice in this matter and can file the personal property suit first and try the same first if they choose. There is no rule of practice or procedure which enables defendant to govern the order in which the cases are tried. Further, there is no rule of practice or procedure which entitles defendant to a stay in the second suit until the first suit can be finally adjudicated and the defense of *res adjudicata* made available. The result, therefore, is that petitioners can force the defendant to go to the trouble and expense of trying both cases, even though defendant is successful in the first. If the cases are tried practically at the same time, petitioners can also put the defendant to the expense of an appellate review of both cases, either as appellant or appellee. Upon analysis, therefore, the defense of *res adjudicata* is seen to be of no practical value in shielding defendant from the necessity of defending both actions.

It is further contended that it will be time enough to file a bill in equity to prevent a multiplicity of suits when it actually appears that there will be a multiplicity. The fallacy of this argument is pointed out by petitioners themselves at pages 11 and 19 of their brief where they cite 36 Stat. 1162, 28 U. S. C. A., Section 379, prohibiting federal courts from enjoining proceedings already pending in state courts. Petitioners would compel us to delay this action until the statute prohibits the district court from granting us the relief

sought. The mere statement of this proposition demonstrates its unsoundness.

Under the law of Missouri, which governs here, as it is probable the two actions at law will be instituted in that state, defendant cannot avoid defending two suits at law on these two policies unless petitioners choose to maintain only one action at a time. The very purpose of the equitable remedy is to save a defendant from this predicament.

(c)

Petitioners contend that if Pete Di Giovanni's suit on the personal property policy is tried first and defeated, it will prevent the maintaining of a suit on the real property policy by husband and wife as tenants by the entirety. In the first place, Pete Di Giovanni can file a motion for a new trial and appeal his case, thereby suspending said judgment and preventing it becoming a final judgment available as a defense under pleas of *res adjudicata* until after defendant had been compelled to stand trial in the second case on the real property policy. Furthermore, the defense of *res adjudicata* as to Pete Di Giovanni would not be available against either him or his wife in an action maintained by them as tenants by the entirety. The case of *Stifel's Union Brewing Company* v. *Saxy*, 273 Mo. 159, 201 S. W. 67, declares the law of Missouri to be that property held by the entirety is not subject to the debts of either tenant by the entirety. This demonstrates the separate nature of the titles of persons holding by the entirety. As the interest of the wife in such case is

not affected by a judgment against her husband then it follows she would not be barred of her rights because a defense of *res adjudicata* would be good against her husband alone. It is the law of Missouri that where persons have a joint estate or joint interest in property, a defense good as against one of them only is not available in a suit brought by them jointly. In the case of *Herrell* v. *St. Louis-San Francisco Ry. Co.*, 324 Mo. 38, 23 S. W. (2d) 102, the Supreme Court of Missouri *in banc* held the defense of contributory negligence of the father was not available in action brought by the mother and father jointly for the death of their minor son. The case of *Fulbright* v. *Phoenix Insurance Company*, 329 Mo. 207, 44 S. W. (2d) 115, simply holds that a husband who obtains insurance representing himself as the owner in fee of the real estate insured has misrepresented the title he cannot recover in a suit maintained by him alone where it appears he holds title with his wife by the entirety.

POINT D.

The Bill Alleged the Face Value of the Two Policies Was $3,000.00 and $1,500.00 Respectively. The Bill Alleged Petitioners Were Claiming a Total Loss and Demanding the Full Face Value of the Policies. The Jurisdictional Amount Was, Therefore, Involved.

Petitioners seek to get before this court, by their motion to complete the record, the provision of the real estate insurance policy for $3,000.00 involved here to the effect that liability under that policy would be proportionate to the total amount of insurance carried. As we

have already pointed out, no attempt was made to get this provision in the record until after the opinion of the circuit court of appeals was rendered against petitioners. We believe the point was not properly preserved and will not be considered by this court but even if that provision were before this court there is no merit in petitioners' contention.

Respondent alleges petitioners are claiming a total loss and are demanding the full face of the policy. These allegations should be accepted as true as petitioners admit. *Grand Chute* v. *Winnegar,* 15 Wall. (U. S.) 373, 376, 21 L. Ed. 174, cited by petitioners. (Br. p. 28.)

The fact that on a trial respondent might be able to convince the jury that the property was not worth more than $6,000.00 and might successfully maintain its defense that it was only liable for a proportionate part of the loss depending on the proportion of its coverage to the total coverage does not eliminate the fact that the amount in dispute is the full face of the policies or $4,500.00. The possibility respondent might establish the defenses mentioned does not cut down the amount involved. Respondent may not be forced out of the federal court on the theory less than the jurisdictional amount is involved as long as it is exposed to the danger of a judgment greater than the jurisdictional amount unless it is successful in maintaining defenses cutting the amount down. In the case of *Schunk* v. *Moline, Milburn & Stoddard Company,* 13 S. Ct. 416, 147 U. S. 500, 504, this court said:

"Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2,500.00, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the $2,500.00; and, whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court?"

Furthermore, respondent alleges in its bill that the face of the policies aggregated amounts to $4,500.00, that petitioners claim a total loss and are demanding the full face value of the policies. (Tr. pp. 1-4.) The petition charges there is involved the sum of $4,500.00. This court has repeatedly ruled as petitioners admit (Petitioners' Brief pp. 30 and 31) that the amount claimed is the amount in dispute unless it conclusively appears from the face of the pleadings that a less amount is involved.

In the case of *Barry* v. *Edmunds*, 6 Sup. Ct. Rep. 501, 116 U. S. 550, where this court said, l. c. 559:

"The order of the circuit court dismissing the cause on this ground is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the circuit court

exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said circuit court.' "

Furthermore, when the bill alleges on its face the jurisdictional amount is involved the burden is on the defendant to prove less than the jurisdictional amount is involved. See *Healy* v. *Ratta*, 292 U. S. 263, 271, 54 S. Ct. 700, 704, *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 333, 27 S. Ct. 529, 532.

In the case of *Wetmore* v. *Rymer*, 18 Sup. Ct. Rep. 295, 169 U. S. 115, this court stated the law as follows, l. c. 128:

"Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant the dismissal of the action for the want of jurisdiction.

The judgment of the circuit court dismissing the action is accordingly reversed, and the cause is remanded with directions to restore the judgment on the verdict."

In the case of *Put-in-Bay W. L. & R. Co.* v. *Ryan*, 181 U. S. 409, 431, 21 S. Ct. 709, this court said, l. c. 717:

> "And it has been several times decided by this court that a suit cannot properly be dismissed by a circuit court as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Barry* v. *Edmunds*, 116 U. S. 550, 29 L. Ed. 729, 6 Sup. Ct. Rep. 501; *Wetmore* v. *Rymer*, 169 U. S. 115, 42 L. Ed. 682, 18 Sup. Ct. Rep. 293."

In the case of *Beecher* v. *Pan-American Life Insurance Company*, 73 Fed. (2d) 263, the Circuit Court of Appeals for the 5th Circuit said, l. c. 264:

> "The court is not chargeable with error in refusing to dismiss the suit as not involving a controversy of an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. *Put-in-Bay Waterworks, etc., Co.* v. *Ryan*, 181 U. S. 409, 431, 21 S. Ct. 709, 45 L. Ed. 927; *Wetmore* v. *Rymer*, 169 U. S. 115, 122, 128, 18 S. Ct. 293, 42 L. Ed. 682."

Under the ruling of the above cases it seems apparent petitioner's contention is without merit. We submit that it does not appear to a legal certainty on this record that an amount less than the jurisdictional amount is herein involved.

POINT E.

The Circuit Court of Appeals Properly Held the Two Claims Arising under the Two Policies of Insurance Could Be Tied Together for the Purpose of Ascertaining the Amount Involved for Jurisdictional Purposes.

(a and b)

The issues under this heading have been discussed by us under Point III, a and b, to which we refer this court.

For all the reasons suggested herein, we respectfully submit that the opinion and decision of the circuit court of appeals in this case was right and should be affirmed by this court.

Respectfully submitted,

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pp. 2,3,4,5,6+7

SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1935.

Pete Di Giovanni and Mary Di Giovanni, Petitioners, *vs.* Camden Fire Insurance Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 11, 1935.]

Mr. Justice Ston[illegible] delivered the opinion of the Court.

This is a suit in equity, brought in the District Court for Western Missouri by respondent, a New Jersey fire insurance company, against petitioners, citizens of Missouri, to cancel two insurance policies. One, for $3,000, was issued to petitioners, who are husband and wife, to insure them against loss by fire of a building which they held as tenants by the entirety. The other, for $1,500, was issued to the husband to insure his personal property located in the building. On motion to dismiss the bill of complaint for want of equity and want of jurisdiction the district court dismissed the suit on the ground that the amount in controversy did not exceed $3,000. Its decree was reversed by the Court of Appeals for the Eighth Circuit, 75 F. (2d) 808. This Court granted certiorari, — U. S. —, to settle an important question of federal law affecting the jurisdiction of federal courts.

The bill of complaint alleges that the petitioners procured the two policies from respondent by representing that they would not effect insurance on the property in excess of a stated amount; that thereafter they did effect insurance with respondent and other companies in excess of that amount, and in excess of the value of the insured property, and then caused the property to be destroyed by fire, all in execution of a conspiracy between them. It avers that petitioners have filed proofs of loss with respondent, and that they threaten to and are about to begin suits at law against respondent to recover the full amounts of its policies.

As the two policies are separate contracts, with different beneficiaries, insuring different properties, it is conceded that no suit at law could be maintained upon them in the federal courts since neither exceeds $3,000, the amount requisite for the juris-

diction of the federal courts, and the two independent causes of action upon them could not be joined in a single suit at law. The Court of Appeals held that the jurisdictional requirement was satisfied by the expedient of seeking cancellation of the two policies in a single suit in equity, wherein their amounts might be united. It recognized that jurisdiction cannot ordinarily be conferred on a federal court by joining in a single suit separate causes of action in none of which is the amount involved more than $3,000 although their aggregate exceeds that sum. *Walker* v. *Northeastern Railroad Co.*, 147 U. S. 370; *Citizens Bank of Louisiana* v. *Cannon*, 164 U. S. 319. But it applied the doctrine sanctioned by this Court in *Woodmen of the World* v. *O'Neill*, 266 U. S. 292; and *McDaniel* v. *Traylor*, 212 U. S. 428, that in a bill to restrain the maintenance of vexatious suits by numerous parties pursuant to a conspiracy among them, the allegations of conspiracy are sufficient to "tie together" the amounts involved in the several suits so that their aggregate is deemed to be the amount in controversy. The Court of Appeals thought that the equity powers of the district court were rightly invoked by the allegations that the two policies were obtained by fraud, and by the prayer for their cancellation; and that the right to this relief was not defeated by the existence of an adequate remedy at law, since it would be necessary to establish the defense to the policies in two suits at law instead of in one in equity, and more especially because the adequate remedy at law which will prevent resort to equity in the federal courts is that available in the federal courts at law, where the suits could not be heard for want of the jurisdictional amount.

We address ourselves only to the question whether the equitable relief is warranted, leaving aside doubts whether the present case, by the allegation that the insurance was effected and the loss caused pursuant to a conspiracy, is brought within the peculiar doctrine of *Woodmen of the World* v. *O'Neill*, *supra*, where the conspiracy was to abuse the processes of the courts by the prosecution of groundless suits.

1. This Court has recently pointed out that equity will not compel the cancellation and surrender of an insurance policy procured by fraud where the loss has occurred and a suit at law to recover the amount of the loss is pending or threatened. *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379. The alleged

fraud of petitioners, as well as their alleged destruction of the property insured are defenses available in suits at law upon the policies. While equity may afford relief *quia timet* by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced, no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent, and there is no showing that the defenses cannot be set up and litigated as readily in a suit at law as in equity. See *Enelow* v. *New York Life Insurance Co.*, *supra*, 384, 385.

2. Section 24 of the Judicial Code, 28 U. S. C. § 41, restricts the jurisdiction of the district courts whether at law or in equity to controversies in which the amount involved exceeds $3,000. Section 267 of the Judicial Code, 28 U. S. C. § 384, forbids the maintenance of suits in equity in the courts of the United States "in any case where a plain, adequate and complete remedy may be had at law." It is true, as this Court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law. See *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121; *Smyth* v. *Ames*, 169 U. S. 466; *Risty* v. *Chicago, Rock Island & Pac. R. R. Co.*, 270 U. S. 378. This follows from the nature of "equity jurisdiction" of the federal courts. Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give. See *Pennsylvania* v. *Williams*, 294 U. S. 176, 181, 182. If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford. Otherwise the suitor in the federal courts might be entitled to a remedy in equity which the federal courts of law are competent to give, or, on the other hand, be obliged to forego his right to be heard in the federal courts in order to secure an equitable remedy which state courts of law do but the federal courts of law do not give. See *Stratton* v. *St. Louis Southwestern Ry.*, 284 U. S. 530, 533, 534; *Matthews* v. *Rogers*, 284 U. S. 521, 529.

But want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers. The statute forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibition of Congress, applicable alike to suits at law and in equity. See *Healy* v. *Ratta*, 292 U. S. 263.

3. As the nature of the relief sought, cancellation of the insurance policies, and the inability of the federal courts to hear the suits at law for want of the jurisdictional amount, do not warrant equitable relief, it is evident that the remedy which respondent seeks depends on the slender thread of its right to ask the federal court of equity to save it the possible inconvenience of trying two law suits instead of one. Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts. See *Ogden City* v. *Armstrong*, 168 U. S. 224; *Hale* v. *Bilicon*, 188 U. S. 56. But the award of this remedy, as of other forms of equitable relief, is not controlled by rigid rules rigidly adhered to regardless of the end to be attained and the consequences of granting the relief sought. It rests in the sound discretion of a court of equity and a theoretical inadequacy of the legal remedy may be outweighed by other considerations. In *Hale* v. *Bilicon*, *supra*, where this Court denied relief to a single plaintiff who sought to unite in a suit in equity claims founded upon the statutory liability of numerous stockholders of a corporation, it was careful to point out, 72-78:

"In any case where the facts bring it within the possible jurisdiction of the court, . . . the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness and the inadequacy of the remedy at law. . . . Each case, if not brought directly within the principle of some preceding case, must, we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; . . . . The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this

ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction."

Lord Hardwick, in laying down the principles which should guide the award of a bill of peace, the progenitor of the modern bill to avoid multiplicity of suits, thought that there was no occasion for the relief where the asserted right could be established by "one or two actions at law." *Lord Tenham* v. *Herbert*, 2 Atk. 483. While it need not be said that under no circumstances could the maintenance of two suits with common issues be so burdensome or inconvenient as to justify equitable relief, see *McHenry* v. *Hayward*, 45 N. Y. 580; compare *Empire Engineering Corporation* v. *Mack*, 217 N. Y. 85, 95, it is nevertheless true that the necessity of maintaining two suits involving the same issue seems rarely to have been burdensome enough to impel a plaintiff to seek equitable relief. Equity not infrequently withholds relief which it is accustomed to give where it would be burdensome to the defendant and of little advantage to the plaintiff. See *Harrisonville* v. *Dickey Clay Company*, 289 U. S. 334, 338, and cases cited; cf. *Willard* v. *Taylor*, 8 Wall. 557; *Hennessy* v. *Woolworth*, 128 U. S. 438; *McCabe* v. *Matthews*, 155 U. S. 550, 553. The present case is different from *Woodmen of the World* v. *O'Neill*, *supra*, where twenty-five groundless suits were being prosecuted against the complainant, and relief of the respondent from the not very certain risk that it may have to try two suits at law upon its two contracts would, without more, hardly compensate for depriving the petitioners of their right to a trial by jury.

The bare fact that a plaintiff is threatened with two suits on the same document and having common issues has been held not to be enough to call for their trial in a single suit in equity. *Druon* v. *Sullivan*, 66 Vt. 609. There appears to be no case in this court where the relief has been granted in such a case and there are numerous cases where equitable considerations were thought to require denial of the relief even though more than two suits were involved. See *Matthews* v. *Rogers*, *supra*, 529, 530, and cases cited.

The grounds for relief to a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real

and substantial and its necessity must affirmatively appear. See *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285, 286; *Dalton Adding Machine Co.* v. *State Corporation Commission*, 236 U. S. 699, 700, 701. Respondent's bill of complaint does not show that petitioners are unwilling to abide the result of a trial of one suit as controlling both; or unwilling to try first the suit in which they would be joint plaintiffs, or that in that case the judgment would not be *res adjudicata* in a subsequent suit, or in any case would not suffice to dispose of both; or that upon appropriate application the state court would not direct the trial of the controlling case first. Where the burden of which the plaintiff complains is so slight he should make a more persuasive showing that it can be avoided only by resort to equity. See *Galion Iron Works* v. *Ohio Corrugated Culvert Co.*, 244 Fed. ~~417~~ 427.

Finally it is to be noted that this tenuous ground for the exercise of equity powers is put forward as the sole medium by which suits may be withdrawn from the jurisdiction of the state courts which could not have been removed to or otherwise brought into the federal courts. While the consequences of the court's grant of equitable relief cannot affect its power, they nevertheless have an important bearing on the exercise of the judicial discretion which must guide a court of equity in determining whether it should grant or withhold a remedy which it is within its power to give. Its discretion may properly be influenced by considerations of the public interests involved. See *United States ex rel. Greathouse* v. *Dern*, 289 U. S. 352, and cases cited. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judicial sections of the Constitution. Congress, by its legislation, has declared its policy that cases involving less than the jurisdictional amount be left exclusively to the state courts, except that a judgment of the highest court of the state adjudicating a federal right may be reviewed by this Court. See *Healy* v. *Ratta*, *supra*, 269, 270. Courts of equity, in the exercise of their discretionary powers, should recognize this policy by scrupulous regard for the rightful independence of the state governments and a remedy infringing that independence, which might otherwise be given, should be withheld if sought on slight or inconsequential grounds. See *Williams* v. *Pennsylvania*,

294 U. S. 176, 185; *Matthews* v. *Rogers, supra*, 575; cf. *Central Kentucky Natural Gas Co.* v. *Railroad Commission of Kentucky*, 290 U. S. 264, 271-273; *Kennedy* v. *Tyler*, 269 U. S. 13.

We think the threatened injury to respondent is of too slight moment to justify a federal court of equity, in the exercise of its discretion, in according a remedy which would entail denial of a jury trial to the petitioners and withdraw from the jurisdiction of the state courts suits which could not otherwise be brought into the federal courts.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.